Petition

81-1055

NO. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DAVID B. POYTHRESS, *et al.*,
Petitioners,

v.

ELIZABETH B. DUNCAN, ELIZABETH N. STOUT and KATHLEEN KESSLER,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, UNIT B, NOW THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. Questions Presented By This Petition

A. Whether the appointment by Governor Busbee of Justice Gregory to a seat on the Supreme Court of Georgia, where it is alleged that Georgia law calls for a special election, supports an action by prospective voters under 42 U.S.C. § 1983 for a denial of due process, notwithstanding *Snowden v. Hughes*, 321 U.S. 1 (1944).

B. Assuming due process to be required in this instance, whether the availability of a mandamus action in State court to compel Secretary of State Poythress to call an election satisfies the requirements of 42 U.S.C. § 1983 and the Fourteenth Amendment, pursuant to *Parratt v. Taylor*, ___ U.S. ___, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981).

II. Question Also To Be Presented If The Writ Is Granted

Whether the district court should have abstained, pursuant to *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), pending resolution in State court of the question whether State law requires an election in this instance.

PARTIES

The parties to this Petition are George D. Busbee, Governor of the State of Georgia; David B. Poythress, Secretary of State of Georgia; Hardy Gregory, Jr., Associate Justice of the Supreme Court of Georgia, and Jesse G. Bowles, Associate Justice of the Supreme Court of Georgia retired, as Petitioners; Elizabeth B. Duncan, Elizabeth N. Stout, and Kathleen Kessler, as Respondents.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, UNIT B, NOW THE ELEVENTH CIRCUIT

The Petitioners, David B. Poythress, George D. Busbee, Jesse G. Bowles, and Hardy Gregory, Jr., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, Unit B, now the United States Court of Appeals for the Eleventh Circuit,[1] entered in this proceeding on September 28, 1981.

[1] Throughout this petition we shall refer to the decision for which certiorari is applied as one of the Fifth Circuit, though the unit of the Fifth Circuit from which the opinion came is now the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported as *Duncan v. Poythress*, 657 F.2d 691 (5th Cir. 1981), and appears as Part I of the Appendix hereto. The decision of the Court of Appeals denying Petitioners' motion for rehearing and suggestion of rehearing *en banc* (without further opinion) is not yet reported, and appears as Part II of the Appendix hereto. The final opinion of the United States District Court for the Northern District of Georgia which occasioned this appeal is reported as *Duncan v. Poythress*, 515 F.Supp. 327 (N.D. Ga. 1981); the judgment and the opinion of the District Court appear as Parts III and IV, respectively, of the Appendix hereto. The opinion of the District Court denying the Defendants' motion to dismiss, not reported, appears as Part V of the Appendix hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on September 28, 1981. A timely petition for rehearing and a suggestion for rehearing *en banc* were filed on October 9, 1981, and were denied on November 18, 1981. This petition was filed within 90 days of the denial of the petition for rehearing. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment of the United States Constitution, Section I:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens

of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

On January 30, 1981, Elizabeth B. Duncan and Elizabeth N. Stout initiated this suit in the United States District Court for the Northern District of Georgia. The complaint brought a civil rights action pursuant to 42 U.S.C. § 1983 against State officials alleging violations of the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution, in that the Plaintiffs were denied the right to vote for Associate Justice of the Supreme Court of Georgia in a special election. The Plaintiffs, in addition, asserted a pendent State claim of fraud, and sought declaratory and injunctive relief, damages and attorneys' fees. There were no allegations that the actions taken were based upon any constitutionally discriminatory intent. Jurisdiction of the District Court was invoked under 28 U.S.C. § 1343(3) and 28 U.S.C. §§ 2201, *et seq.*

For the purposes of this petition the suit arises from facts which are undisputed.[3] The Constitution of the State of Georgia provides for the popular election of State Supreme Court justices to six-year terms. Art. VI, Sec. II, Para. III, Constitution of the State of Georgia of 1976 (Ga. Code Ann. § 2-3103). If a vacancy occurs in any unexpired term, the Governor appoints a successor. *Id.* The election code of Georgia provides that whenever a person elected to public office withdraws before taking office, the vacancy is to be filled by a special election, in this situation to be called by the Secretary of State. Ga. Code § 34-1514. The dispute in this case is over whether the vacancy caused by the resignation of Justice Jesse G. Bowles from the Supreme Court of Georgia should be filled by appointment or by a special election.

Jesse G. Bowles became an Associate Justice of the Supreme Court of Georgia by the appointment of Governor Busbee on April 25, 1977. Justice Bowles was subsequently elected to fill a term of office as an Associate Justice until December 31, 1980. On November 4, 1980, Justice Bowles was re-elected to a six-year term to commence January 1, 1981.

As a result of some personal problems, Justice Bowles wrote Governor Busbee on November 20, 1980, stating "I find I must resign my Commission as Associate Justice of the Supreme Court of Georgia, effective December 31, 1980." Pursuant to the request of two citizens, Elizabeth B. Duncan and Elizabeth N. Stout—later to become plain-

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[3] The only factual dispute raised in the District Court and the Court of Appeals concerns a State law issue which was decided against the Defendants. Neither the State law issue nor the facts upon which it was based are raised in this petition.

tiffs in this action—Secretary of State David B. Poythress inquired of Justice Bowles whether he intended to withdraw from his present term or the new term to which he had been elected on November 4, 1980. Justice Bowles responded that he did not intend to withdraw from the term to which he had been elected and that he intended to take the oath of office and enter into the duties of his new term. Based upon these assurances of Justice Bowles, Secretary of State Poythress decided not to call a special election. Secretary of State Poythress wrote Ms. Duncan and Ms. Stout informing them of his investigation, its results and his decision.

On December 15, 1980, Justice Bowles took the oath of office for his new term, and on January 1, 1981, he entered upon the duties of his new term. As a result of his personal problems, Justice Bowles decided to resign his new term on January 5, 1981, and so notified the Governor. On January 8, 1981, Governor Busbee appointed Hardy Gregory, Jr., to fill the vacancy left by Justice Bowles' resignation.

Elizabeth B. Duncan and Elizabeth N. Stout filed their complaint in this case on January 30, 1981. On February 18, 1981, Defendants filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) on the ground that the complaint failed to state a claim upon which relief could be granted; the motion was denied on March 10, 1981. A trial on the merits of the case was held April 1-2, 1981, at which time Kathleen Kessler was added as a Plaintiff. At the end of the Plaintiffs' case, Defendants renewed their motion for dismissal, pursuant to Fed. R. Civ. P. 41(b). The court denied the motion.

On April 28, 1981, the District Court rendered its decision on the merits, finding that State law required a

special election and that in failing to call the election Secretary of State Poythress and Governor Busbee violated Plaintiffs' rights under the Due Process Clause of the Fourteenth Amendment. The equal protection argument and the pendent State claim were denied.[3] The District Court ordered that a special election be held, that Justice Gregory be prohibited from running as an incumbent, and that the Plaintiffs be awarded one dollar in damages and be awarded attorneys' fees and costs. A notice of appeal was filed the following day.

On September 23, 1981, a panel of the Fifth Circuit affirmed the decision of the District Court, holding that the Due Process Clause of the Fourteenth Amendment protects the right to vote in State elections of State officials. A petition for rehearing and a suggestion for rehearing *en banc* were timely filed and, on November 18, 1981, were denied.

REASONS FOR GRANTING THE WRIT

I. CONFLICT WITH DECISIONS OF THIS COURT

A. THE DECISION OF THE COURT OF APPEALS—THAT THE RIGHT TO VOTE IN A STATE ELECTION FOR A STATE SUPREME COURT JUSTICE IS PROTECTED BY THE DUF PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT—IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH THE DECISIONS OF THIS COURT CULMINATING IN *SNOWDEN V. HUGHES*, 321 U.S. 1 (1944).

The Court of Appeals holds that the Georgia statute calling for a special election is the proper law to be fol-

[3] The denial of this claim has not been appealed.

lowed in this case, rather than the constitutional provision authorizing Governor Busbee to fill the vacancy by appointment. Thus, the Court of Appeals further holds that the appointment by Governor Busbee of Justice Gregory to a seat on the Supreme Court of Georgia, where State law requires the position to be filled by a special election, violates the right of Georgia citizens to vote in State elections of State officials, protected by the Due Process Clause of the Fourteenth Amendment of the United States Constitution. There was neither allegation nor finding of any intent to discriminate on the basis of any constitutionally prohibited classification, nor was there any finding of malice or intent to disenfranchise.

The holding of the Court of Appeals is in direct and irreconcilable conflict with a line of decisions of this Court culminating in *Snowden v. Hughes*, 321 U.S. 1 (1944), where it is held that a violation of State election law by State officials does not violate the Due Process Clause. The *Snowden* Court, dealing with the specific question of due process, states:

> "More than forty years ago this Court determined that an unlawful denial by state action of a right to state political office is not a denial of a right of property or of liberty secured by the due process clause. *Taylor & Marshall v. Beckham*, 178 U.S. 548. Only once since has this Court had the occasion to consider the question and it then reaffirmed that conclusion, *Cave v. Newell*, 246 U.S. 650, as we reaffirm it now." 321 U.S. at 7.

The reasoning of this Court, citing and applying State voting cases to come to its conclusion, makes it clear that the right to vote and the right to run for State political office are inextricably intertwined and the principles which apply to candidates apply with equal force to voters, as

this Court consistently holds. *E.g. Lubin v. Panish*, 415 U.S. 709, 716 (1974); *Bullock v. Carter*, 405 U.S. 134, 143 (1972). Thus *Snowden* controls and requires the dismissal of the suit for want of jurisdiction or failure to state a claim.

The decision of the Court of Appeals initially acknowledges the controlling nature of *Snowden* but attempts to distinguish it. "At first glance," the Court of Appeals states, "the broad language of *Snowden* . . . would appear to preclude the Section 1983 claim filed by the Georgia voters." [Appendix, p. 27a]. In seeking to distinguish the instant case, the Court of Appeals states that *Snowden* concerns a mere: "garden variety challeng[e] to the manner in which ballots were counted by state election officials"; whereas, the case at bar involves a fundamentally unfair practice which threatens the democratic system. [Appendix, p. 28a]. On this basis the panel holds *Snowden* does not control. *Id.*

This purported distinction is patently incorrect.[4] *Snowden* does not involve a "garden variety challenge" to ballot counting—indeed it has nothing to do with ballot counting at all—but concerns facts far more threatening to the democratic system than those involved here. Quite significantly, *Snowden* was before this Court to review the granting of the defendants' motion to dismiss. The complaint in *Snowden* alleged that the plaintiff was one of several candidates for State senator in the Republican

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[4] In addition to the other undesirable results stated below, the distinction posited by the lower court also has the effect of resurrecting the wooden "rights—privileges" distinction laid to rest by this Court in *Board of Regents v. Roth*, 408 U.S. 564 (1972). Contrary to *Roth*, the panel's "garden variety" distinction makes due process protection hinge on the grievousness of the wrong, not the nature of the loss.

primary. The primary was to yield two Republican nominees, and based upon the Illinois plan of proportional representation, nomination was tantamount to election. After the primary the plaintiff was certified by Cook County as having the second highest number of votes. However, the State Canvassing Board—in direct contravention of State law—refused to grant the plaintiff a certificate of nomination necessary to have his name placed on the general election ballot. The Complaint filed by the plaintiff alleged the defendants, the members of the State Canvassing Board, "willfully, maliciously, and arbitrarily" failed and refused to file the requisite certificate, that they conspired and confederated for that purpose, and that their action constituted "an unequal, unjust and oppressive administration" of the laws of Illinois. 321 U.S. at 4. In summarizing the alleged cause of action, this Court finds:

> "In substance petitioner's alleged cause of action is that the members of the State Primary Canvassing Board, acting as such but in violation of state law, have by their false certificate or proclamation and by their refusal to file a true certificate deprived petitioner of nomination and election in the state assembly." 321 U.S. at 5.

The plaintiff in *Snowden* alleged no "garden variety challenge to ballot counting" as the panel characterized it; he claimed a blatant, malicious conspiracy of State officials in violation of State law, to deny him a State office by refusing to certify his nomination. The facts alleged in *Snowden*—unlike the situation here—involve a malicious conspiracy of State officials to violate State law, a far more heinous state of affairs than that found in the instant case.

Taking the allegations of the complaint to be true, as it must in considering the propriety of granting the motion to dismiss, and reasoning from cases involving the right to vote for State offices, the *Snowden* Court holds that *the Due Process Clause of the Fourteenth Amendment does not reach State elections of State officials.* Indeed the *Snowden* Court in finding the motion to dismiss proper, concludes that the "violation of a State statute does not infringe the federal Constitution." 321 U.S. at 11. This broad pronouncement of the *Snowden* Court is based upon facts which, if they can be found distinguishable from the instant case, can only be described as involving a far more serious affront by State officials to democratic principles. The decision of the Court of Appeals, failing to follow the clear holding of this Court, is thus in direct and irreconcilable conflict with *Snowden*, warranting the grant of the writ.

B. THE DECISION BELOW IMPROPERLY LIMITS *PARRATT V. TAYLOR*, ___ U.S. ___, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), TO PROCEDURAL DUE PROCESS ACTIONS AND CONFLICTS WITH THE PRINCIPLES ANNOUNCED IN A VENERABLE LINE OF SUBSTANTIVE DUE PROCESS CASES.

The Court of Appeals holds below that the right to vote for State officers in State elections is protected by the substantive aspects of the Due Process Clause; thus it reasons that this Court's decision in *Parratt v. Taylor*, *supra*, does not apply because *Parratt* concerns procedural rather than substantive due process. This holding improperly limits *Parratt* and conflicts with a venerable line of substantive due process cases.

Parratt holds that where a 42 U.S.C. § 1983 claim meets

the three prerequisites for a due process violation—State action, a protected right, and a deprivation of that right—the requirements of the Fourteenth Amendment are still satisfied if State law provides a means to redress the asserted deprivation. Since the panel recognizes that a mandamus action in the State courts was available to the plaintiffs to redress their asserted deprivation, and the opinion clearly states that the Court and the plaintiff acknowledge that a fair and impartial trial of the issues can be had in the Courts of Georgia [Appendix, p. 9a, N.4], *Parratt* requires that due process be found to be satisfied. But the lower court held that *Parratt* applies only to procedural due process violations, not to deprivations of substantive due process as it found involved here.

Even if the right here concerned is protected by substantive due process, such a finding only recognizes the protected right that would, under the *Parratt* analysis, otherwise arise from another source. *Cf. Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (property rights arise from independent sources such as State law). There is no basis to hold that *Parratt* would not apply to the deprivation of a substantive due process right as it does to the deprivation of a common law property right. As Justice Rehnquist stated writing for the majority in *Parratt*, 68 L.Ed.2d at 430, the Fourteenth Amendment does not absolutely prevent the deprivation of rights, "[t]he Fourteenth Amendment protects only against deprivations 'without due process of law.' " [*quoting Baker v. McCollan*, 443 U.S. 137, 145 (1979).] Here the Court of Appeals recognizes that mandamus was available to the Plaintiffs under Georgia law, hence it can not be said that they were without due process. The Court of Appeals' decision improperly limits *Parratt*, warranting the grant of the writ.

The Court of Appeals' decision, even if its analysis of *Parratt* is accurate, is in conflict with a half-century long line of cases standing for the principle that substantive due process protects only " 'the individual's freedom of choice with respect to certain basic matters of procreation, marriage, and family life.' " *Harrah Independent School District v. Martin*, 440 U.S. 194, 198 (1979); *quoting Kelly v. Johnson*, 425 U.S. 238, 244 (1976); *citing Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Meyer v. Nebraska*, 262 U.S. 390 (1923). Voting in a State election clearly does not involve procreation, marriage or family life and is thus not within the narrow range of interests protected by substantive due process. The Court of Appeals' decision, consequently, conflicts with the principles announced in these cases, warranting the grant of the writ.

II. CONFLICT WITH APPELLATE COURT DECISIONS

A. IN CONCLUDING THAT A VIOLATION BY STATE OFFICIALS OF A STATE ELECTION STATUTE CONSTITUTES A VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, THE FIFTH CIRCUIT DECISION DIRECTLY CONFLICTS WITH DECISIONS OF THE SECOND, SEVENTH, AND EIGHTH CIRCUITS, AND WITH AN EARLIER DECISION OF THE FIFTH CIRCUIT ITSELF.

The Court of Appeals for the Fifth Circuit concludes, following the First Circuit case of *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978), that State law mandates an election to be held in the instant case and that the refusal of State officials to hold such an election in violation of

State law constitutes a denial of liberty protected by the Due Process Clause of the Fourteenth Amendment. In so holding, the decision of the Court of Appeals directly conflicts with the decisions of the Second, Seventh and Eighth Circuits.

Relying on *Snowden v. Hughes*, 321 U.S. 1 (1944), the Courts of Appeals for the Second and Seventh Circuits hold that the violation by State officials of State election law does not constitute a violation of the Due Process Clause of the Fourteenth Amendment. *Mrazek v. Suffolk County Board of Elections*, 630 F.2d 890, 899 (2nd Cir. 1980); *Powell v. Power*, 436 F.2d 84, 88 (2nd Cir. 1970); *Hennings v. Grafton*, 523 F.2d 861, 864 (7th Cir. 1975); *Moore v. Kusper*, 465 F.2d 256, 258 (7th Cir. 1972); *Briscoe v. Kusper*, 435 F.2d 1046, 1052-53 (7th Cir. 1970). The Eighth Circuit, relying upon the Second Circuit decision in *Powell*, *supra*, likewise holds that a violation of a State election law by State officials does not offend the Due Process Clause. *Pettengill v. Putnam County R-1 School District*, 472 F.2d 121, 122 (8th Cir. 1973).

The confusion among the circuits is also reflected in the conflict of decisions within the Fifth Circuit. Compare the instant case with *Johnson v. Hood*, 430 F.2d 610, 612 (5th Cir. 1970), which holds that even the improper denial of the right to vote for a candidate for a state office by State action is not a denial of property or liberty secured by the Due Process Clause. The decision of the First Circuit and this decision of the Fifth Circuit are now arrayed against those of the Second, Seventh and Eighth Circuits and an earlier decision of the Fifth Circuit on the same issue, a condition warranting the grant of the writ to resolve the conflict.

B. THE HOLDING OF THE COURT OF APPEALS THAT A VIOLATION OF A STATE STATUTE VIOLATES THE DUE PROCESS CLAUSE CONFLICTS WITH THE PRINCIPLES ANNOUNCED IN DECISIONS OF ALL BUT ONE CIRCUIT.

Snowden v. Hughes, 321 U.S. 1 (1944), holds that the violation of a State statute, without some showing of the violation of a federal right, does not of itself violate the Federal Constitution. 321 U.S. at 11. As demonstrated below, this principal is adopted and applied in numerous decisions of the Courts of Appeals. The decision in the instant case relies upon a bootstrap argument in contravention of this principle, finding a violation of liberty protected by the Due Process Clause by the mere violation of a State election statute. The panel decision is thus in conflict with the principles announced in the decisions of the First [5], Second [6], Third [7], Sixth [8], Seventh [9], Eighth [10], Ninth [11], and Tenth [12] Circuits. This conflict is also re-

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[5] *Cabrera v. Municipality of Bayamon*, 562 F.2d 91, 102 (1st Cir. 1977); *City of Boston v. Massachusetts Port Authority*, 444 F.2d 167, 169 (1st Cir. 1971).

[6] *Association for the Preservation of Freedom of Choice v. Simon*, 299 F 2d 212, 214 (2d Cir. 1962).

[7] *Charters v. Shaffer*, 181 F.2d 764, 765 (3d Cir. 1950).

[8] *Combs v. Tennessee*, 530 F.2d 695, 698 (6th Cir.), *cert. denied*, 425 U.S. 954 (1976); *Otto v. Somers*, 332 F.2d 697, 700-01 (6th Cir. 1964), *cert. denied*, 379 U.S. 1002 (1965).

[9] *French v. Henye*, 547 F.2d 994, 998 (7th Cir. 1976); *Skolnick v. Spolar*, 317 F.2d 857, 859 (7th Cir.), *cert. denied*, 375 U.S. 904 (1963).

[10] *Hirrill v. Merriweather*, 629 F.2d 490, 496 (8th Cir. 1980); *Byrd v. Sexton*, 277 F.2d 418, 424-32 (8th Cir.) (Blackmun, C.J.), *cert. denied*, 364 U.S. 818 (1960).

[11] *Stiltner v. Rhay*, 322 F.2d 314 (9th Cir. 1963), *cert. denied*, 376 U.S. 920 (1964); *Rupp v. Tufts*, 235 F.2d 674, 676 (9th Cir.), *cert. denied*, 352 U.S. 900 (1956).

[12] *Torres v. First State Bank of Sierra County*, 588 F.2d 1322, 1326 (0th Cir. 1978).

flected in the conflict of decisions within the Fifth Circuit [13], and warrants the grant of the writ.

III. THE APPELLATE COURT HOLDING SIGNIFICANTLY EXPANDS FEDERAL JURISDICTION TO COVER STATE ELECTION CASES WHICH ALLEGE MORE THAN "GARDEN VARIETY" VIOLATIONS OF STATE LAW

It is appropriate for this Court to grant certiorari to exercise its supervisory powers over the lower federal courts where a case presents a significant question of federal jurisdiction, *Bruner v. United States*, 343 U.S. 112 (1952), particularly where the case constitutes a threat to the goal of uniformity in federal decisions, *Hanna v. Plumer*, 380 U.S. 460 (1965). The Court of Appeals in the instant case readily acknowledges the new ground it breaks, accepting jurisdiction where in all but one case [14] other circuits have returned the litigant to the state forum. [Appendix, p. 17a].

Snowden v. Hughes, 321 U.S. 1 (1944), concludes that a violation of a State election statute by State officials does not state a federal claim within the jurisdiction of the District Court. 321 U.S. at 13. This holding is followed in decisions of the Second, Fifth, Seventh and Eighth Circuits.[15] Yet the court in the instant case now significantly expands the jurisdiction of the district courts

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[13] Compare, for example, the instant case with *McDowell v. Texas*, 465 F.2d 1342 (5th Cir. 1972) (*en banc*), *cert. denied*, 410 U.S. 943 (1973) (termination, in violation of State law, of State employee who has no State right to continued employment does not implicate due process), and *Hamilton v. Chaffin*, 506 F.2d 904 (5th Cir. 1975) (violation by police of State juvenile detention statute does not implicate due process).

[14] *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978).

[15] See Section II.A., *supra*.

to hear State election cases by arbitrarily limiting the mandate of *Snowden* to what it calls "garden variety" violations of State election laws. Such an amorphous distinction will not only keep most litigants in court beyond a motion to dismiss, making federal courts the battleground of the future for local election contests, but it will result in widely differing results on the determination of federal jurisdiction. Some courts, faithful to *Snowden* will deny jurisdiction to all alleged State election violations while those which adopt the lower court's formulation may differ on whether, for example, a registrar's late mailing of absentee ballots is "garden variety" or not. This significant expansion of federal jurisdiction coupled with its attendant lack of a workable standard to assure uniformity of decisions warrants this Court to exercise its supervisory powers and grant the writ.

IV. IMPORTANCE OF THE ISSUES

The question here presented, the extent to which the Due Process Clause limits the right of States to control the filling of State offices, is central to the concept of Federalism. This issue is not only undeniably important in itself, but it is also of great moment given the particular facts of this case and the potential application of the decision below in the significant expansion of federal jurisdiction to encompass all State claims. We respectfully submit that the importance of the issues in this case warrants the granting of the writ.

Justice Frankfurter, speaking for the Court in *Stefanelli v. Minard*, 342 U.S. 117 (1951), and reflecting upon the application of the Civil Rights Act, concludes that "the Court's lodestar of adjudication has been that the statute 'should be construed so as to respect the proper

balance between the States and the federal government. . . .' " 342 U.S. at 121. This federal balance is nowhere more delicate than in the inherently local function of selecting local officials. To substitute for the judgment of State officers, who are subject to local control, the determination of the federal judiciary concerning how the State Supreme Court is constituted, is to arrogate to the federal domain a prerogative essential to local independence. Justice Black succinctly summarizes this concept in his majority opinion in *Oregon v. Mitchell*, 400 U.S. 112, 125 (1970):

> "No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualification of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices."

We submit that the State court, not the federal court, is the proper forum for the adjudication of local election challenges. The appellate decision here shifts the power to govern a State's election procedures from the State courts to the federal judiciary.

This shift of power from the State to the federal judiciary is accomplished by a remarkable expansion of federal jurisdiction. The appellate decision finds jurisdiction for district courts to entertain State election challenges, contrary to the holding of this Court in *Snowden v. Hughes*, 321 U.S. 1 (1944). The thrust of the Court of Appeals' decision is that State courts are competent to handle only garden variety cases, even where as here the legal issue arises from State laws concerning a purely local matter. Novel or important cases, the Court of Appeals effectively says, belong in federal court. It cannot be denied that the

resolution of this jurisdictional conflict is of great importance to the States, which will lose control over their electoral processes, and to the federal courts, which will be called upon to regulate all aspects of State elections.

The impact of the case will be felt far beyond cases alleging violations of State election laws. The reasoning of the appellate court can be applied to find violations of the Due Process Clause, and thus a basis for federal jurisdiction, for all alleged violations of State laws. In a line of post-war cases the Courts of Appeals struggled with the question of whether an erroneous decision of a State court, being contrary to State law, constitutes a denial of due process and thus is remediable in federal court.[11] This specific question is answered by this Court in *Gryger v. Burke*, 334 U.S. 728 (1948), in which Justice Jackson states:

> "We cannot treat a mere error of state law . . . as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question." 334 U.S. at 731.

Yet the holding below, by finding a violation of the Due Process Clause as a result of a violation of State law, breathes life into this doctrine, previously long laid to rest. Should this appellate decision be followed, the federal courts will become super-appellate courts for the relitigation of State court civil actions, even as the dual nature of *habeas corpus* practice has bogged down our system of criminal justice.

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[11] *E.g. McGuire v. Todd*, 198 F.2d 60 (5th Cir.), *cert. denied*, 344 U.S. 835 (1952); *Bottone v. Lindsey*, 170 F.2d 705 (10th Cir. 1948), *cert. denied*, 336 U.S. 944 (1949).

Finally, few cases can be imagined that place in higher relief the problem of federal intervention in State elections.[17] The controversy is straightforward and unclouded by the issue of prohibited discrimination.[18] Simply put, State officials feel in this situation that the law requires the Supreme Court vacancy to be filled by appointment while the federal courts are of the opinion that an election is appropriate. We submit that any controversy over the propriety of the appointment should be determined by a State court particularly where—as here—the question is one of first impression. The States should and must have control over the determination of the processes to fill such important positions if they are to continue as separate and sovereign members of the federal system.

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[17] *Thompson v. Talmadge*, 201 Ga. 867 (1947), a case in which three men claimed to be the duly elected Governor of Georgia upon the death of Governor Eugene Talmadge, involved the State's highest political office. The Georgia Supreme Court resolved this complex and politically explosive confrontation without federal intervention.

[18] *Cf. Bynum v. Burns*, 379 F.2d 229 (8th Cir. 1967) (election matters pertaining solely to state office are not usually covered by the Fourteenth Amendment unless race is involved) (Blackmun, Gibson and Van Oosterhout, C.J.J.).

CONCLUSION

For the reasons stated above, we respectfully submit that a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit in this case.

Respectfully submitted,

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Appendix

PART I

APPELLATE COURT DECISION

Elizabeth B. DUNCAN, et al.,

Plaintiffs-Appellees,

v.

David B. POYTHRESS, et al.,

Defendants-Appellants.

No. 81-7363.

United States Court of Appeals,
Fifth Circuit.
Unit B

Sept. 28, 1981.

Appeal from the United States District Court for the Northern District of Georgia.

Before FRANK M. JOHNSON, Jr. and HATCHETT, Circuit Judges, and SCOTT*, District Judge.

HATCHETT, Circuit Judge:

In this appeal we review a decision of the district court holding that Georgia's special election statute, Ga.Code § 34-1514, requires the selection of a successor for a resigning member of the Georgia Supreme Court by means of a popular election. The district court committed no abuse of discretion in refusing to abstain from hearing this section 1983 civil rights action. 42 U.S.C. § 1983. We agree with its conclusion that the due process clause of the fourteenth amendment to the United States Constitution protects against the disenfranchisement of a state elec-

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*District Judge of the Middle District of Florida, sitting by designation.

torate in violation of state election law. We also concur in the district court's conclusion that Georgia Code section 34-1514 mandates the calling of a special election under the circumstances of this case. We therefore affirm the decision of the district court, 515 F.Supp. 327, to order the calling of a special election to fill the vacancy on the Georgia Supreme Court created by the resignation of Justice Jesse G. Bowles.

BACKGROUND

Several registered voters of Georgia brought this action in district court claiming that the refusal of state officials to call a special election to fill a position on the Georgia Supreme Court violated their constitutionally protected right to vote. The voters named as defendants George D. Busbee, the Governor of Georgia; Jesse G. Bowles, a former associate justice of the Georgia Supreme Court whose resignation triggered the events leading up to this suit; Hardy Gregory, Jr., an associate justice appointed by Governor Busbee to replace Justice Bowles on the supreme court; and David B. Poythress, the Georgia Secretary of State with responsibility for the calling of special elections for positions on the Georgia Supreme Court.[1] The Georgia Constitution provides for the popular election of justices on the state's highest court, Ga. Const. art. 6, § 2, ¶3, and state law provides that "whenever any person elected to public office shall . . . withdraw prior to taking office . . . then [state officials] shall thereupon call a special . . .

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[1] Defendants Gregory and Poythress were joined in this action solely for the purpose of affording the voters complete relief. They were not implicated in the actions which gave rise to the voters' complaint.

election to fill such position." Ga.Code § 34-1514.[1]

Justice Bowles held a term of office as an associate justice which ended on December 31, 1980. On November 4, 1980, he was re-elected to the Georgia Supreme Court for a six-year term to begin on January 1, 1981. On November 20, 1980, however, he wrote a letter of resignation to Governor Busbee stating that his resignation would be effective on December 31, 1980. The governor accepted this resignation by letter dated November 21, 1980.

On December 15, 1980, Justice Bowles took the oath of office for the new term of office scheduled to begin on the first day of 1981. On January 5, 1981, his first day in office during the new term, Justice Bowles sent a second letter of resignation to the governor. The governor accepted this resignation on the same day. Three days later, on January 8, the governor swore in Hardy Gregory, Jr., as a replacement for Justice Bowles on the Georgia Supreme Court.

The circumstances surrounding this unusual sequence of events have been described in great detail in the carefully written opinion of the district court. The record fully supports the district court's description of the attempts by Georgia officials to fill the judicial vacancy through executive appointment. The district court also described the

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[1] Georgia's special election statute, Ga.Code § 34-1514, provides in full:

> Whenever any primary or election shall fail to fill a particular nomination or office and such failure cannot be cured by a run-off primary or election, or whenever any person elected to public office shall die or withdraw prior to taking office, or whenever any person elected to public office shall fail validly to take that office, then the authority, with whom the candidates for such nomination or office filed their notice of candidacy, shall thereupon call a special primary or election to fill such position.

efforts of the voters who brought this suit to assure the calling of a special election. We attach as an appendix that portion of the district court's opinion describing the underlying circumstances of this case. To address the points raised on appeal, however, we need focus only upon three of the district court's findings of fact. Though disputed on appeal by the Georgia officials, each of these findings is well supported by the record and is affirmed in this appeal for reasons discussed in the final portion of this opinion.

First, the district court found that Justice Bowles intended to vacate both the term he was then serving and the upcoming term to which he had been elected when he delivered his first letter of resignation on November 20, 1980. The court stated that the contention of the Georgia officials that Justice Bowles intended to resign only from his current term is "neither logical nor, when viewed in light of all the evidence, credible." In reaching this conclusion, the district court emphasized that

> [w]hile it is unusual for any public official who intends to continue holding office to submit a letter of resignation, it is extremely odd, as the defendants concede, for a resignation allegedly applicable only to that official's current term to be effective on the day that term would naturally expire as a matter of law. On the other hand, an official who intends to give up his office altogether might very well make his resignation effective on the last day of his present term since that is a logical and convenient termination date.

The district court also noted that Justice Bowles took no steps to correct the widespread public impression that he would be leaving office forever on the last day of 1980. Justice Bowles never asked the governor to halt the search for his successor begun by the state's Judicial Nominating Commission in early December. As the district court stated:

> [A]lthough the defendants testified that on the morning of January 5, 1981, Justice Bowles had not yet decided to resign, Governor Busbee had no knowledge of his imminent resignation, and Hardy Gregory had not had contact with the Governor since his December interview, Justice Bowles called Gregory, his replacement, that morning to discuss the transition.

Second, the district court found that the Georgia officials understood and responded to Justice Bowles's November resignation letter as a decision to leave the court permanently on the last day of his current term. The governor did not accept this resignation letter in the belief that it represented just a one-day resignation. Instead, the governor, Justice Bowles, Charles Tidwell (the governor's executive counsel in charge of judicial nominations), and the members of the Georgia Judicial Nominating Commission, all acted with the intention and expectation of replacing Justice Bowles through executive appointment. As noted by the district court:

> The Governor, Justice Bowles, and Charles Tidwell considered and discussed the timing of the justice's impending resignation at meetings in the Fall of 1980. With the aid of the Governor's office, Bowles timed his resignation expressly to assist the Commission and the Governor in choosing his successor. The Governor's office initiated the Commission's search for Bowles' replacement, interviewed candidates, and apparently chose his successor before Bowles' second resignation was tendered on January 5, 1981. After the plaintiffs initiated their efforts, Busbee and Tidwell familiarized themselves with and discussed the special election statute at a meeting on November 24, 1980. The Governor subsequently stated at his December 4, 1980, press conference that he did not favor a special election to fill Justice Bowles' seat on the Supreme Court because of the cost involved and the probable low voter turnout . . . .

Third, the district court found that Justice Bowles did not intend to rescind his resignation by taking the oath of office for the upcoming term on December 15, 1980, and by briefly entering upon the duties of that office on January 5, 1981. Very little evidence was presented to indicate that Justice Bowles intended to rescind his earlier withdrawal, or that the governor consented to that recision. In view of the ongoing search for Justice Bowles's successor, the district court found that his "taking the oath of office for his new term is more logically seen as an effort to ensure the appointment of his successor than as a genuine reconsideration of his decision to leave the court."

In sum, the district court found that on November 20, 1980, Justice Bowles intended to resign permanently from the Georgia Supreme Court as of the last day of the term he was then serving. On November 21, 1980, the governor accepted this permanent resignation. The district court further found that throughout the following weeks there was no change in Bowles's intention to leave the court, or in the Governor's intention to select his successor.

Shortly after Justice Bowles sent his second resignation letter and Hardy Gregory was sworn in as his successor, several voters brought this action seeking the following equitable relief: a declaration that the refusal of Georgia officials to call a special election violated their rights of suffrage under the state and federal constitutions; an order requiring the calling of a special election so that the Georgia electorate could choose a successor for Justice Bowles; an order enjoining Justice Gregory from further service on the Georgia Supreme Court; and an order enjoining Justice Gregory from running in the requested special election as an incumbent. The voters sought dam-

ages in the amount of one dollar each as nominal compensation for the denial of their right to vote. They also sought one million dollars in punitive damages from defendants Busbee and Bowles for financing of the special election.

The Georgia officials responded with three principal arguments. First, they asked the district court to apply the doctrine established in *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), and abstain from hearing this case. Second, they argued that even if they violated the provisions of Georgia's special election statute, such a violation does not give rise to a constitutional claim. Third, they offered an interpretation of the facts in this case and the election laws of Georgia seeking to show that Georgia's special election statute, Ga.Code § 34-1514, does not apply to this case.

The district court decided that *Pullman* abstention is inappropriate in this case because the special election statute lacks the ambiguity required under the *Pullman* doctrine. The district court then held that the due process clause of the fourteenth amendment offers protection against the disenfranchisement of an entire state electorate through the refusal of public officials to call a special election as required by law. Finally, the district court rejected various arguments offered to show that Georgia's special election statute permits the selection of Justice Bowles's successor through gubernatorial appointment rather than popular election. The court therefore declared that the Georgia electorate had been deprived of a constitutionally protected right to vote.

The district court ordered the calling of a special election to choose Justice Bowles's successor, and it enjoined

Justice Gregory from running in this election as an incumbent. The court declined, however, to enjoin Justice Gregory from further service on the court, holding that his swearing in by the governor "vested Justice Gregory with de facto authority to act as an Associtae Justice both prior and subsequent to this judgment." The court awarded the voters one dollar each as nominal damages, but declined to award punitive damages since it found that the Georgia officials lacked the requisite malice. The district court also granted attorney's fees to the voters under the Civil Rights Attorney's Fees Award Act. 42 U.S.C. § 1988. Since it found that state law claims overlapped with the federal claims, the district court found no reason to reach pendant state law claims. The district court likewise found it unnecessary to grant the voters relief under the equal protection clause of the fourteenth amendment since the court found that they could secure redress through its due process guarantees.[3]

A Fifth Circuit panel stayed the district court's order pending disposition of this appeal.

ISSUES

Since the Georgia officials have renewed their principal arguments on appeal, we must resolve three issues: (1) whether the district court abused its discretion in declining to invoke *Pullman* abstention; (2) whether the Georgia special election statute, Ga.Code § 34-1514, requires the Georgia officials to call a special election; and (3) whether the due process clause of the fourteenth amendment offers

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[3] Because we agree with the rationale, as well as the decision, of the district court, we too have no occasion to reach the claims of the voters which are based on either state law or the equal protection clause of the fourteenth amendment.

any protection to state citizens if state officials refuse to call an election as required by state law.

ABSTENTION

We begin by addressing the contention of the Georgia officials that the district court should have refused to hear this case because of the principles of abstention set forth by the Supreme Court in *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). The *Pullman* doctrine authorizes abstention when a federal court faces a constitutional challenge which is intertwined with an ambiguous issue of state law and there is a likelihood that clarification of the state law will moot or substantially alter the federal question. *See Palmer v. Jackson*, 617 F.2d 424, 428 (5th Cir. 1980); *Gibson v. Jackson*, 578 F.2d 1045, 1048 (5th Cir. 1978), *cert. denied*, 439 U.S. 1119, 99 S.Ct. 1028, 59 L.Ed.2d 79 (1979).[4]

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[4] Federal abstention also presupposes the availability of an alternative state forum which can afford full and fair relief. The Georgia voters do not argue that they lack an effective remedy in the Georgia courts, and it appears that they might be able to bring a mandamus action to force compliance with a law requiring public officials to call a special election. See Ga.Code § 64-101 (a writ of mandamus will lie to compel performance of official duties in the absence of a specific legal remedy); *City of Atlanta v. League of Women Voters of Atlanta-Fulton County, Inc.*, 244 Ga. 796, 262 S.E.2d 77 (1979) (a writ of mandamus will lie to force officials to comply with a law calling for a special election to fill a municipal office). There is no need to dwell upon this prerequisite to abstention because the voters have likewise avoided any claim that the courts of Georgia are unable to adjudicate impartially their claim of an illegal gubernatorial appointment to the Georgia Supreme Court. We likewise perceive and intimate no reason to doubt the fairness—either in fact or appearance—of adjudication of this case by the courts of Georgia. Cf., *Palmer v. Jackson*, 617 F.2d 424 (5th Cir. 1980) (rejecting *Pullman* abstention despite the asserted absence of an adequate state forum when lower state courts would be called upon to review administrative acts of the state's highest court).

While ambiguity in a state's law and the likelihood of avoiding constitutional adjudication are both necessary for *Pullman* abstention, they are not always sufficient, since abstention is a matter of "principled discretion not doctrinaire adherence." *Gibson*, 578 F.2d at 1048. "The abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law; it rather involves a discretionary exercise of a court's equity powers." *Baggett v. Bullitt*, 377 U.S. 360, 375, 84 S.Ct. 1316, 1324, 12 L.Ed.2d 377 (1964). In fact, the stay of federal decision is "an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188, 79 S.Ct. 1060, 1062, 3 L.Ed.2d 1163 (1959) (quoted in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976)). The extraordinary nature of abstention stems from the duty of decision imposed by Congress upon the district courts.

> Congress could, of course, have routed all federal constitutional questions through the state court systems, saving to [the Supreme] Court the final say when it came to review of the state court judgments. But our First Congress resolved differently and created the federal court system and in time granted the federal courts various heads of jurisdiction, which today involve most federal constitutional rights. . . .
>
> . . . We would negate the history of the enlargement of the jurisdiction of the federal district courts, if we held the federal courts should stay its hand and not decide the question before the state courts decided it.

Wisconsin v. Constantineau, 400 U.S. 433, 437-39, 91 S.Ct. 507, 510-11, 27 L.Ed.2d 515 (1971) (footnotes

omitted). *See High Ol' Times, Inc. v. Busbee*, 621 F.2d 135, 139 (5th Cir. 1980); *Johnson v. American Credit Co. of Georgia*, 581 F.2d 526, 530 n. 6 (5th Cir. 1978).

Since abstention is the exception rather than the rule, the Supreme Court has required a finding of "special circumstances" before allowing a district court to deny a federal plaintiff the forum that he has lawfully chosen for the resolution of his constitutional claims. *E. g., Zwickler v. Koota*, 389 U.S. 241, 248, 88 S.Ct. 391, 395, 19 L.Ed.2d 444 (1967) (*Pullman* abstention is appropriate only in "narrowly limited 'special circumstances.' "). *See* Wright, *Law of Federal Courts*, § 52, at 220 (3rd ed. 1976). ("The Court continues to require 'special circumstances' to justify abstention".)

An alleged denial of voting rights does not, in itself, constitute a "special circumstance" which automatically precludes federal court abstention. *See, e. g., Harrison v. NAACP*, 360 U.S. 167, 79 S.Ct. 33, 3 L.Ed.2d 53 (1959); *Romero v. Coldwell*, 455 F.2d 1163 (5th Cir. 1972). It is also true, however, that in deciding whether or not to abstain, a federal court "must . . . take into consideration the nature of the controversy and the particular right sought to be enforced." *Edwards v. Sammons*, 437 F.2d 1240, 1243 (5th Cir. 1971) (abstention held inappropriate "based . . . on the imperative of the right to vote"). It therefore appears that "when voting rights, racial equality and First Amendment rights of expression have been at stake the [United States Supreme Court] has been reluctant to abstain." 1A J. Moore Federal Practice ¶ 0.203[1], at 2111-12 (2d ed. 1976). *E. g., Harman v. Forssenius*, 380 U.S. 528, 537, 85 S.Ct. 1177, 1183, 14 L.Ed.2d 50 (1965) (abstention held inappropriate in view of "the nature of the constitutional deprivation," a denial

of the "fundamental right to vote").

Just as an alleged denial of voting rights does not preclude federal abstention, so the absence of pending state proceedings does not mandate federal adjudication. Of course, abstention entails piecemeal litigation and the resulting delay in most acute when a federal plaintiff must initiate state proceedings. While federal courts have often pointed to the presence of a pending state action as one factor supporting abstention, *e. g.*, *Harris County Commissioners Court v. Moore*, 420 U.S. 77, 83, 95 S.Ct. 870, 875, 43 L.Ed.2d 32 (1975); *Abell v. Frank*, 625 F.2d 653, 658 (5th Cir. 1980); *Finch v. Mississippi State Medical Association, Inc.*, 585 F.2d 765, 778 (5th Cir. 1978), we have never deemed the lack of pending state proceedings to be a circumstance that necessarily prevents federal abstention. *See Romero v. Coldwell*, 455 F.2d 1163, 1167 (5th Cir. 1972).

In summary, the extraordinary decision to stay federal adjudication requires more than ambiguity in state law and a likelihood of avoiding constitutional adjudication. A district court must carefully assess the totality of circumstances presented by a particular case. This requires a broad inquiry which should include consideration of the rights at stake and the costs of delay pending state court adjudication. Because of the complexity of factors which guide a particular decision on *Pullman* abstention, we have often held that a decision of the district court will be reversed on appeal only upon a showing of an abuse of the discretion entrusted to a trial court. *E. g.*, *Redbluff Drive-In, Inc. v. Vance*, 648 F.2d 1020, 1032 n. 15 (5th Cir. 1981); *Chancery Clerk of Chickasaw City, Mississippi v. Wallace*, 646 F.2d 151, 154 (5th Cir. 1981); *High Ol' Times*, 621 F.2d at 138-39; *Ross*, 559 F.2d infra at 943 (5th Cir.

1977); *accord*, *Harman*, 380 U.S. at 534, 537, 85 S.Ct. at 1181-82 (1965); *see* Wright, *Law of Federal Courts*, § 52, at 224 (3rd ed. 1976).

Turning to the case before us, we cannot say that the district court abused its discretion in declining to invoke *Pullman* abstention. The district court recognized that if the Georgia courts should interpret the state's election laws in a manner that validated the appointment of Justice Bowles's successor, then no reason would exist for the federal courts to decide whether an illegal denial of a special election violates the United States Constitution. Specifically, the district court noted that the Georgia special election statute mandates the calling of an election only when an elected candidate "withdraws" before assuming an office to which he has been elected. Ga.Code § 34-1514. Whether Justice Bowles's November 20, 1980, letter of resignation constituted a "withdrawal" from his upcoming term of office as well as resignation from his current term is a question of state statutory construction. If the state courts should answer this question in the negative, there would be no need for the district court to decide whether the refusal to call a special election in violation of section 34-1514 deprives the Georgia electorate of a constitutionally protected right to vote.

The district court declined to abstain, however, after finding no likelihood of avoiding constitutional questions by sending the Georgia voters to the state courts because the meaning of the special election statute is clear. We agree. The Supreme Court has "frequently emphasized that abstention is not to be ordered unless the state statute is of uncertain nature, and is obviously susceptible of a limiting construction." *Zwickler*, 389 U.S. at 251 n. 14, 88 S.Ct. at 397 n. 14. We have therefore rejected *Pull-*

man abstention in all cases lacking ambiguity in state law. *E. g., Chancery Clerk of Chickasaw City, Mississippi v. Wallace*, 646 F.2d 151 (5th Cir. 1981); *High Ol' Times v. Busbee*, 621 F.2d 141 (5th Cir. 1980); *Johnson v. American Credit Co. of Georgia*, 581 F.2d 526 (5th Cir. 1978).

The final section of this opinion will explore several asserted limitations upon the scope of Georgia's special election statute, but here we note our agreement with the district court that section 34-1514 simply means what it says: a special election is required when an officeholder withdraws from a future term. Despite creative arguments by the Georgia officials, we can see no reasonable room for interpreting the special election statute in any manner other than its plain meaning would indicate. A basic canon of statutory construction is that words should be interpreted in accordance with their plain and ordinary meaning unless a clear, contrary legislative intention is shown. *United States v. Apfelbaum*, 445 U.S. 115, 100 S.Ct. 948, 63 L.Ed.2d 250 (1980); *United States v. Yeatts*, 639 F.2d 1186 (5th Cir. 1981).

The mere fact that this statute has never been interpreted by the state courts does not indicate sufficient ambiguity to justify *Pullman* abstention. The "mere absence of judicial interpretation does not necessarily render [state law] unsettled or uncertain." *B.T. Investment Managers, Inc. v. Lewis*, 559 F.2d 950, 954 (5th Cir. 1977). *See, e. g., Zablocki v. Redhail*, 434 U.S. 374, 379 n. 5, 98 S.Ct. 673, 677 n. 5, 54 L.Ed.2d 618 (1978); *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971); *Zwickler v. Koota*. "Of course, as every attorney knows, *any* statutory provision can be made ambiguous through a sufficiently assiduous application of legal discrimination." *Babbitt v. United Farm*

Workers National Union, 442 U.S. 289, 315-16, 99 S.Ct. 2301, 2318, 60 L.Ed.2d 895 (1979) (Brennan, J., concurring in part and dissenting in part). *Pullman* abstention is appropriate, however, only when there is sufficient ambiguity in state law to create a reasonable probability that state courts could eliminate or alter the federal constitutional issue. *See, e. g., Zwickler v. Koota*, 389 U.S. 241, 251 n. 14, 88 S.Ct. 391, 397, 19 L.Ed.2d 444 (1967) (abstention held inappropriate because state statute was not "obviously susceptible of a limiting construction"); *Harrison v. NAACP*, 360 U.S. 167, 176-77, 79 S.Ct. 1025, 1030, 3 L.Ed.2d 1152 (1959) (abstention held appropriate because state statute was "fairly open to interpretation" and there was "reasonable room for a construction" by the state courts which would moot or alter the federal issue); *Ibarra v. Bexar County Hospital District*, 624 F.2d 44, 47 (5th Cir. 1980) (abstention held appropriate when disputed state laws were "sufficiently vague that they reasonably could be interpreted as either party contends"). We agree with the district court that the statute is so clear that this case offers little hope of avoiding constitutional adjudication by deferring federal decision while the Georgia voters initiate state proceedings.

In addition to the clarity of the Georgia election law, the circumstances surrounding this case further support the district court's refusal to abstain. At issue in this case is nothing less than the fundamental right to vote. The delay inherent in abstention is least tolerable where, as here, fundamental constitutional rights enjoyed by a broad class of citizens would be suspended while adjudication begins in state court. *See, e. g., Baggett v. Bullitt*, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964) (first amendment rights); *Edwards v. Simmons*, 437 F.2d 1240 (5th Cir. 1971) (voting rights); *Ross v. Houston Indepen-*

dent School District, 559 F.2d 937 (5th Cir. 1977) (school desegregation rights). The delay inherent in abstention takes a particularly heavy toll when a voting rights challenge raises doubts in the public mind about the ligitimacy of officeholders and the governmental bodies on which they serve. *See Edwards v. Sammons*, 437 F.2d 1240 (5th Cir. 1971).

In the voting rights case of *Harman v. Forssenius*, the Supreme Court has pointed to such considerations as independent justifications for the refusal of a district court to abstain:

> In addition to the clarity of [previously uninterpreted state election] statutes, support for the District Court's refusal to stay the proceedings is found in the nature of the constitutional deprivation alleged and the probable consequences of abstaining. The District Court was faced with two class actions attacking a statutory scheme allegedly impairing the right to vote in violation of Art. I, § 2, and the Fourteenth, Seventeenth and Twenty-fourth Amendments. As this Court has stressed on numerous occasions, '[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.' The right is fundamental 'because preservative of all rights.' *Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S.Ct. 1064, [1071], 30 L.Ed. 220, 226. In appraising the motion to stay proceedings, the District Court was thus faced with a claimed impairment of the fundamental civil rights of a broad class of citizens. The motion was heard about two months prior to the deadline for meeting the statutory requirements and just eight months before the 1964 general elections. Given the importance and the immediacy of the problem, and the delay inherent in referring questions of state law to state tribunals, it is evident that the District Court did not abuse its discretion in refusing to abstain.

380 U.S. 528, 537, 85 S.Ct. 1177, 1183, 14 L.Ed.2d 50 (1965) (footnotes omitted) (citations omitted). We likewise refuse to find an abuse of discretion in the decision of the district court to determine without delay whether the citizens of Georgia have been denied the right to select for themselves a person to serve on the state's highest court. Since the meaning of the special election statute is clear, and the cost of further delay would be prohibitive, *Pullman* abstention is simply inappropriate in the circumstances of this case.

CONSTITUTIONAL ISSUES

This case brings before us a question heretofore unanswered in the Fifth Circuit: whether the due process clause of the fourteenth amendment offers protection against those rare, but serious, violations of state election laws that undermine the basic fairness and integrity of the democratic system. Although we recently decided that the fourteenth amendment provides no guarantee against innocent irregularities in the administration of state elections, we were not required to determine when state election practices "may operate so unfairly as to constitute a denial of . . . due process . . . ." *Gamza v. Aguirre*, 619 F.2d 449, 454 n. 6 (5th Cir. 1980) (citing *Griffin v. Burns*, 570 F.2d 1065, 1078-79 (1st Cir. 1978) and *Briscoe v. Kusper*, 435 F.2d 1046 (7th Cir. 1970)). The approach which we adopted in *Gamza*, however, and the guidance offered by cases such as *Griffin* and *Briscoe*, point the way to our holding today that the due process clause of the fourteenth amendment prohibits action by state officials which seriously undermine the fundamental fairness of the electoral process.

The Georgia voters brought this suit under 42 U.S.C. § 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343

(3). Section 1983 provides a remedy for the deprivation of rights "secured by the Constitution and laws" of the United States by persons acting under color of state law. 42 U.S.C. § 1983.[4] There is no doubt that the Georgia officials were acting under color of state law in filling the judicial vacancy created by Justice Bowles's resignation through gubernatorial appointment rather than through a special election. In a case in which the state action requirement of section 1983 was satisfied, the Supreme Court recently reminded us that "[t]he first inquiry in any § 1983 suit . . . is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws.' " *Baker v. McCollan*, 443 U.S. 137, 140, 99 S.Ct. 2689, 2692, 61 L.Ed.2d 433 (1979). The sufficiency of the voters' complaint therefore turns on whether the state officials violated the Georgia special election statute, Ga.Code § 34-1514, and if so, whether this constitutes a deprivation of federally protected rights. In this section of the opinion, we consider the state officials' argument that even if the appointment illegally disenfranchised the Georgia electorate, this violation of state law does not rise to the level of a constitutional deprivation.

"Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections." *Reynolds v. Sims*, 377 U.S. 533, 554, 84 S.Ct. 1362, 1377-78, 12 L.Ed.2d 506 (1964).

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[4] 42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Qualified citizens not only have a constitutionally protected right to vote, *Ex parte Yarbrough*, 110 U.S. 651, 45 S.Ct. 152, 28 L.Ed. 274 (1884), but also the right to have their votes counted, *United States v. Mosley*, 238 U.S. 383, 35 S.Ct. 904, 59 L.Ed. 1355 (1915), a right which can neither be denied outright, *Lane v. Wilson*, 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281 (1939), nor destroyed by alteration of ballots, *United States v. Classic*, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941), nor diluted by ballot box stuffing, *United States v. Saylor*, 322 U.S. 385, 64 S.Ct. 1101, 88 L.Ed. 1341 (1944). The reason for such constitutional protection is clear:

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. . . .
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> . . . 'No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.'
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> . . . Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

Reynolds v. Sims, 377 U.S. at 555-562, 84 S.Ct. at 1378-1381 (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S.Ct. 526, 535, 11 L.Ed.2d 481 (1964)).

While *Reynolds* and numerous other Supreme Court decisions confirm that voting rights are, at bottom, fed-

erally protected, it is a closer question whether the actions of Georgia officials amounted to a constitutional violation entitled to a section 1983 remedy in a federal court. As we noted in *Gamza*,

> constitutional decision must not be confined merely to the logical development of the philosophy of prior decisions unfettered by other considerations. The functional structure embodied in the constitution, the nature of the federal court system and the limitations inherent in the concepts both of limited federal jurisdiction and of the remedy afforded by section 1983 must all be fully attended.

619 F.2d at 452. In view of such limitations, this court set forth in *Gamza* the following guide for determining whether a particular challenge to a state election practice rises to a level deserving of federal protection:

> As *Baker v. McCollan*, 433 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979), requires in tort cases, the determination that particular conduct constitutes a constitutional deprivation rather than a lesser legal wrong depends on the nature of the injury, whether it was inflicted intentionally or accidentally, whether it is part of a pattern that erodes the democratic process or whether it is more akin to a negligent failure properly to carry out the state ordained electoral process and whether state officials have succumbed to 'temptations to control . . . elections by violence and by corruption . . . .'

619 F.2d at 453 (quoting *Ex parte Yarbrough*, 110 U.S. 651, 666, 4 S.Ct. 152, 159-60, 28 L.Ed. 274, 279 (1884)).

The *Gamza* guidelines are necessarily stated in general terms, but their significance for this case will become clearer after an examination of particular state election practices which have been challenged in this and other federal courts. In *Powell v. Power*, 436 F.2d 84 (2d Cir.

1970), for example, the Second Circuit held that the due process clause of the fourteenth amendment offers no guarantee against an unintentional error in the supervision of an election which allowed a number of people to cast ballots even though they were unqualified under state law to participate in the election. The court noted that to interpret section 1983 as providing a remedy for all election irregularities would cause the federal courts to be "thrust into the details of virtually every election, tinkering with the state's election machinery, reviewing petitions, registration cards, vote tallies, and certificates of election for all manner of error and insufficiency under state and federal law." 436 F.2d at 86. The *Powell* court concluded that the federal courts are neither equipped, nor empowered, to rectify every alleged election irregularity.

The Seventh Circuit likewise denied relief under section 1983 in a case involving the malfunctioning of voting machines and innocent human errors in the administration of a local election. *Hennings v. Grafton*, 523 F.2d 861 (7th Cir. 1975). Recognizing that such errors are inevitable in a society which relies upon volunteers to conduct most elections, the *Hennings* court held that fully-adequate state review procedures provide the appropriate avenue for the redress of inadvertent election mistakes. The Seventh Circuit acknowledged, however, that section 1983 does provide a remedy for the violation of due process rights through "willful conduct which undermines the organic processes by which candidates are elected." 523 F.2d at 864.

The Eighth Circuit similarly refused to interject the federal courts into a controversy over whether illegally cast ballots were mistakenly counted by local election officials. *Pettengil v. Putnam County R-1 School District*,

472 F.2d 121 (8th Cir. 1973). The court indicated, however, that federal intervention would be appropriate in cases presenting "aggravating factors such as . . . unlawful conduct which interferes with the individual's right to vote . . . ." 472 F.2d at 122.

We have also returned litigants with garden variety election challenges to the state tribunals and procedures established for the specific purpose of ensuring that the declared winner of an election has actually received the highest number of legally cast ballots. *E.g.*, *Hubbard v. Ammerman*, 465 F.2d 1169 (5th Cir. 1972), *cert. denied*, 410 U.S. 910, 93 S.Ct. 967, 35 L.Ed.2d 272 (1973); *Johnson v. Hood*, 430 F.2d 610 (5th Cir. 1970). In so doing, we have recognized that the constitution leaves to the states broad power to regulate the conduct of federal and state elections. *See generally Roundebuss v. Hartke*, 405 U.S. 15, 92 S.Ct. 804, 31 L.Ed.2d 1 (1972); *Oregon v. Mitchell*, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970). In fact, we have specifically recognized that states enjoy broad authority to dispense with the elective process and provide by law that judicial vacancies shall be filled by gubernatorial appointment rather than popular election. *Holley v. Askew*, 583 F.2d 728 (5th Cir. 1978).

Despite this broad authority enjoyed by the states over the scope and conduct of elections, the federal courts have not hesitated to interfere when state actions have jeopardized the integrity of the electoral process. Of course, most cases of federal court intervention have been brought under the fourteenth amendment's equal protection clause and concerned the purposeful denial, or dilution, of the voting rights of a segment of the electorate. In *Bell v. Southwell*, 376 F.2d 659 (5th Cir. 1967), for instance, this court voided a state election and ordered a special elec-

tion—with full recognition of the "[d]rastic, if not staggering" nature of this relief—because racially discriminatory practices in the administration of a local election rose in constitutional significance far above the usual claim of election irregularities.

Less frequent than such equal protection cases are those instances in which federal courts have intervened in state election matters because of a violation of the fourteenth amendment guarantee of due process. On this ground, the Seventh Circuit has held that section 1983 provides a federal remedy if state officials place a sham candidate on a ballot in order to appoint his successor following his expected victory and pre-arranged resignation. *Smith v. Cherry*, 489 F.2d 1098 (7th Cir. 1973), *cert. denied*, 417 U.S. 910, 94 S.Ct. 2607, 41 L.Ed.2d 214 (1974). The *Smith* court concluded that officials had effectively disenfranchised the entire electorate:

> Those who thought they were voting for [the sham candidate] were as a practical matter voting for whomever the [officials] might thereafter select. . . . This deception on the face of the ballot clearly debased the rights of all voters in the election. Such an abridgement of the right to vote is impermissible and evinces the sufficiency of this complaint.

489 F.2d at 1102.

The Seventh Circuit came to the same conclusion when state officials failed to notify prospective candidates of new and rigorous ballot placement procedures and then denied these candidates an adequate opportunity to examine nomination petitions which had been disqualified. *Briscoe v. Kusper*, 435 F.2d 1046 (7th Cir. 1970). In this due process case, the court reasoned (a) that the "liberty" protected from state impairment by the due process clause of the fourteenth amendment includes the freedoms of

speech and association guaranteed by the first amendment; (b) that these first amendment freedoms extend to political activities such as running for elective office; and (c) that state election practices must therefore serve legitimate state interests "narrowly and fairly to avoid obstructing and diluting these fundamental liberties." 435 F.2d at 1054.

The First Circuit has likewise granted relief under section 1983 when state election officials offered the electorate absentee ballots which were later declared invalid on the ground that state law precluded their use in the challenged election. *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978). In ordering a new election, the *Griffin* court employed an analysis similar to that used by this court in *Gamza*. The First Circuit recognized that the administration of elections is generally a matter of state concern, but noted that "Supreme Court decisions leave no room for doubt that plaintiffs' voting rights are, at bottom, federally protected." *Griffin*, 570 F.2d at 1075. The *Griffin* court proposed the following guide for determining whether a particular challenge to a state election practice constitutes one of the extraordinary cases in which federal intervention is appropriate:

> If the election process itself reaches the point of patent and fundamental unfairness, a violation of the due process clause may be indicated and relief under § 1983 therefore in order. Such a situation must go well beyond the ordinary dispute over the counting and marking of ballots . . . .
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> . . . [Federal courts have properly intervened when] the attack was, broadly, upon the fairness of the official terms and procedures under which the election was conducted. The federal courts were not asked to count and validate ballots and enter into the details of the

> administration of the election. Rather they were confronted with an officially-sponsored election procedure which, in its basic aspect, was flawed. Due process, '[r]epresenting a profound attitude of fairness between man and man, and more particularly between individual and government,' . . . is implicated in such a situation. . . . In cases falling within such confines, we think that a federal judge need not be timid, but may and should do what common sense and justice require.

Griffin, 570 F.2d at 1077-78 (quoting *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring)). The *Griffin* court acknowledged that there is no single, bright line to distinguish cases in which federal intervention is appropriate from those in which it is inappropriate, but the court had no difficulty in finding that disqualification of absentee ballots previously offered by election officials represents "broad-gauged unfairness" that calls for a new election. 570 F.2d at 1078.

The challenge brought in this case resembles that in *Griffin* since it implicates the very integrity of the electoral process. If the Georgia officials denied the Georgia electorate the right granted by state statute to choose a replacement for Justice Bowles, then we are faced with "patent and fundamental unfairness" in the electoral process. *Griffin*, 570 F.2d at 1077. The Georgia voters are not asking the federal courts to count ballots or otherwise "enter into the details of the administration of [an] election." 570 F.2d at 1078. Their request is far simpler and more basic: they ask for the election itself, as required by state law.

The guidelines set forth in *Gamza* likewise show that the Georgia voters complain of a "constitutional deprivation rather than a lesser legal wrong." 619 F.2d at 453.

In contrast to the isolated election irregularities alleged in *Gamza*, the denial of a legally-required election obviously "erodes the democratic process." 619 F.2d at 453. Unlike the inadvertent election errors alleged in *Gamza*, the decision to dispense with a special election was deliberate. As found by the district court:

> The Governor, Justice Bowles, and Charles Tidwell considered and discussed the timing of the justice's impending resignation at meetings in the Fall of 1980. . . . After the plaintiffs initiated their efforts, Busbee and Tidwell familiarized themselves with and discussed the special election statute at a meeting on November 24, 1980. The Governor stated at his December 4, 1980 press conference that he did not favor a special election to fill Justice Bowles' seat on the Supreme Court because of the cost involved and the probable low voter turnout. . . .
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> . . . .
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> In our view, the evidence establishes that Justice Bowles resigned his office, including his new term, on November 20, 1980, that the defendants had decided to replace the justice by appointment rather than by special election, and that the process by which the Governor selects and appoints justices to the appellate courts in Georgia had been initiated and was operating with the knowledge, consent, and cooperation of defendants Busbee and Bowles after November 20, 1980.

The Georgia voters may complain of a far more serious legal wrong than that established in *Griffin* and contemplated in *Gamza* because the entire state electorate has been deprived of the right to participate in an election. The district court stated that it "can conceive of no more fundamental flaw in the electoral process than the deprivation of the right to vote altogether." We likewise can imagine no claim more deserving of constitutional protection than the allegation that state officials have purposely

abrogated the right to vote, a right that is fundamental to our society and preservative of all individual rights. Just as the equal protection clause of the fourteenth amendment prohibits state officials from improperly diluting the right to vote, the due process clause of the fourteenth amendment forbids state officials from unlawfully eliminating that fundamental right. The United States Constitution protects against complete deprivation as well as invidious discrimination. It is fundamentally unfair and constitutionally impermissible for public officials to disenfranchise voters in violation of state law so that they may fill the seats of government through the power of appointment. We therefore hold that such action violates the due process guarantees of the fourteenth amendment.

The Georgia officials would avoid this conclusion through reliance upon the Supreme Court's decision in *Snowden v. Hughes*, 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497 (1944), and this court's decision in *Johnson v. Hood*, 430 F.2d 610 (5th Cir. 1970). In *Snowden* the high Court said that "an unlawful denial by state action of a right to state political office is not a denial of a right of property or of liberty secured by the due process clause." 321 U.S. at 7, 64 S.Ct. at 400. In *Johnson* we said that "the right to vote in a state election, in itself, is not a right secured by the constitution or by federal law." 430 F.2d at 610. At first glance, the broad language of *Snowden* and *Johnson* would appear to preclude the section 1983 claim filed by the Georgia voters. Such pronouncements, however, can only be understood in the context of the facts which prompted them: both cases involved garden variety challenges to the manner in which ballots were counted by state election officials. Neither case involved

fundamentally unfair election practices or purposeful conduct which threatened the democratic system. *Snowden* and *Johnson* thus fall in the line of cases holding that the constitution offers no guarantee against insubstantial election irregularities. Reading the language of these cases in the context of their facts, we conclude that neither case precludes our granting of federal relief when public officials disenfranchise an entire electorate in violation of state law. Without challenging the holding in either *Snowden* or *Johnson*, we simply decline to read their broad language as precluding federal relief in this very different case of a fundamental breakdown of the democratic system.

The Georgia officials also rely upon the recent case of *Parratt v. Taylor*, ____ U.S. ____, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), which required the Supreme Court to "decide whether the tort remedies which the State of Nebraska provides as a means of redress for property deprivations satisfies the requirements of *procedural due process*." ____ U.S. at ____, 101 S.Ct. at 1914, 68 L.Ed.2d at 430 (emphasis added). The *Parratt* Court concluded that Nebraska's judicial remedies fully and fairly compensated those who suffer the tortious taking of property and therefore satisfied the fourteenth amendment requirement of procedural due process.

It is important to recognize that *Parratt* concerned procedural due process rather than substantive due process. The *Parratt* Court was not required to define the limits of those substantive rights which are grounded in the Bill of Rights and applied to the states because of their incorporation into the due process clause of the fourteenth amendment. Once the *Parratt* Court found state procedures fully adequate to satisfy the requirements of

due process, the constitutional basis of that section 1983 case disappeared.

The voters in this case, by contrast, do not base their section 1983 claim upon any inadequacy in Georgia's judicial remedies. Their due process claim is not procedural, but substantive: they allege the unlawful abrogation of a constitutionally protected right to vote. *Parratt* relegates those who claim procedural unfairness to state judicial remedies when those remedies afford procedural due process. *Parratt* provides no support to the Georgia officials, however, because this case turns on the substantive guarantees of the due process clause. *Parratt* gives us no hesitation in holding that one of those guarantees is the right to be free from the purposeful decision of state officials to deny the citizens of a state the right to vote in an election mandated by law.

GEORGIA ELECTION LAWS

Georgia's special election law provides that "whenever any person elected to public office shall die or withdraw prior to taking office . . . then [state officials] shall thereupon call a special . . . election to fill such position." Ga. Code § 34-1514. Justice Bowles was elected to serve on the Georgia Supreme Court for a term to begin on the first day of 1981, and the district court found that he withdrew from this office by resigning permanently prior to taking office. Since a statute should normally be interpreted in accordance with the plain meaning of its language, *Perrin v. United States*, 444 U.S. 37, 100 S.Ct. 311, 62 L.Ed.2d 199 (1980), the simple words of section 34-1514 would seem to require the calling of a special election to replace Justice Bowles. The Georgia officials make five separate arguments, however, to show that

they legally replaced Justice Bowles through gubernatorial appointment. Their first three arguments challenge the district court's interpretation of Georgia's election laws; their remaining two arguments challenge the district court's factual findings.

First, the Georgia officials perceive a difference under Georgia law between resigning from a current term of office and withdrawing from a future term. The concept of "withdrawal" embodied in the special election statute is said to exclude a resignation such as that tendered by Justice Bowles and accepted by Governor Busbee. Justice Bowles termed his November letter as a letter of resignation and Governor Busbee treated it as such. The special election statute uses the term "withdrawal," Ga. Code § 34-1514, while the statute which lists the various ways in which a vacancy may occur speaks in terms of a "resignation." Ga.Code § 89-501(1).[6]

[6] Ga.Code § 89-501 provides:

All offices in the State shall be vacated—

1. Death

By the death of the incumbent.

2. Resignation

By resignation, when accepted

3. Judgment

By decision of a competent tribunal declaring the office vacant.

4. Incapacity

By voluntary act or misfortune of the incumbent, whereby he is placed in any of the specified conditions of ineligibility to office, which shall operate from the time the fact is ascertained and declared by the proper tribunal.

5. Nonresidence

By the incumbent ceasing to be a resident of the State, or of the county, circuit, or district for which he was elected. In the first case the office shall be vacated immediately; in the latter cases, from the time the fact is judicially ascertained.

6. Failing to obtain commission or give bond

By failing to apply for and obtain commissions or certificates, or by failing to qualify or give bond, or both, within the time prescribed by the laws and Constitution.

7. Abandonment of office

By abandoning the office and ceasing to perform its duties, or either.

The district court concluded, however, that for purposes of triggering the special election requirement, a resignation constitutes a withdrawal from public office. The court stated:

> Although the statute specifies only death and withdrawal as events which trigger a special election, it seems clear that the legislature meant, by withdrawal, any voluntary vacating of the position to which one had been elected. The ordinary, logical means by which an incumbent voluntarily leaves office is by resignation. Therefore, if the statute is to serve its intended purpose, its language must be construed to encompass resignations. Moreover, we note that the defendants' awareness of the now assertedly crucial distinction between withdrawal and resignation appears to be of recent origin. By their own testimony, the defendants were unaware of the difference at the time Justice Bowles submitted his first resignation letter on November 20, 1980, and they failed to make the point during their depositions in this matter in early March 1981. Nor have the defendants cited us to any cases supporting their construction of the statute. In these circumstances, we decline to superimpose a technical requirement of 'withdrawal' on the facially clear special election statute.

We agree that the term "withdrawal" in the special election statute must be read to encompass "resignations." Only then will it effectuate the legislative purpose of allowing the people of Georgia to fill vacancies which occur in elective offices either voluntarily (by withdrawal) or involuntarily (by death) before an elected official assumes office.

Second, the Georgia officials argue that Justice Bowles was incapable of triggering the requirement for a special election since it is legally impossible for a person to resign from a term of office which has not begun. Justice Bowles's

resignation letter of November 20, 1980, is therefore said to have been ineffective as a resignation from the term to which he had been recently elected, but which would not begin until the first day of 1981. This argument appears to proceed as follows: The cases of *Crovatt v. Mason*, 101 Ga. 246, 28 S.E. 891 (1897) and *Hardwick v. Swearingen*, 12 Ga. 23 (1852), show that Georgia's special election statute codifies a common-law rule requiring the calling of a new election when the winner of an election is ineligible to assume office. Since the special election statute codifies one common-law doctrine, we are urged to read into it other common-law doctrines pertaining to elections. One such doctrine provides that a person cannot resign from a term of office which he has not yet assumed, as shown by the cases of *Miller v. Sacramento County*, 25 Cal. 93 (1864); *Partain v. Maddox*, 227 Ga. 623, 182 S.E.2d 450 (1970); *Patten v. Miller*, 190 Ga. 123, 8 S.E.2d 757 (1940); and *Dibelka v. Reinberg*, 263 Ill. 536, 105 N.E. 715 (1914). The word "withdrawal" in the special election statute is therefore said to exclude an attempted resignation from a future term of office.

Even if the special election statute codifies one common-law doctrine, and even assuming that another common-law doctrine precludes resignations from future terms, no legal principle compels the superimposition of two legal doctrines simply because they date from the same era. Judicial duty prohibits us from doing so when this would violate the intent of the Georgia Legislature. In passing the special election statute, the Georgia Legislature intended to allow the electorate to fill an elective term which would be vacant from its inception. By specifying death and withdrawal as events which trigger the special election requirement, the legislature indicated the

full reach of its intention by providing for a new election when either involuntary or voluntary actions created such a vacancy. We would dishonor this intention by imposing upon the wide reach of the special election statute a prohibition upon resignation from future terms. If the courts were to require an official in Justice Bowles's position to assume an upcoming term of office before submitting a letter of resignation, this would always leave an unexpired term rather than a full term of office. Since state law provides for executive appointment to fill an unexpired term on the Georgia Supreme Court, such a judicial interpretation would read a severe limitation into broad statutory terms without any indication that this would serve an unexpressed legislative purpose. *See* Ga.Const. art. 6, § 2, ¶ 3. We therefore decline to superimpose upon the simple words of the special election statute a common-law doctrine which threatens to violate the apparent intentions of the Georgia Legislature.

The Georgia officials' third argument is that even if a resignation from a future term of office can trigger the requirement of a special election, Justice Bowles did not effectively resign because he addressed his November letter of resignation to the governor instead of the Georgia Secretary of State. The common law requires that a resignation be directed to, and accepted by, the authority empowered to act upon that resignation before an intended resignation is legally effective. *Edwards v. United States*, 103 U.S. 471, 26 L.Ed. 314 (1880). Only the secretary of state is authorized to call a special election to fill a vacancy on the Georgia Supreme Court. Since Justice Bowles addressed his November letter to the governor instead of the secretary of state, it is said to have been ineffective as a resignation under the common law, and

thus ineffective as a "withdrawal" under the special election statute.

Though the secretary of state alone is empowered to call a special election under the circumstances of this case, neither the special election statute which conveys this power, nor any other statute indicates that a resignation which triggers such an election should be submitted to the secretary. The only Georgia statute dealing with the reporting of resignations states that "resignations of all officers [1] whose commission issued from the office of the Secretary of State or the Executive Department, and [2] whose places *may* be supplied by executive appointment, shall be made to the Governor." Ga.Code § 89-504 (emphasis added).

We agree with the district court that this statute answers the argument of the Georgia officials by showing that Justice Bowles properly addressed his November letter of resignation to the governor. Justice Bowles's position satisfied the first requirement of section 89-504: his commission as an Associate Justice of the Georgia Supreme Court issued from the secretary of state. Ga. Code § 89-201. As for the second requirement of section 89-504, it is true that a special election is required in those unusual cases in which a person elected to a term on the court dies or withdraws prior to taking office. Ga. Code § 34-1514. Executive appointment, though, is the means established by the Georgia Constitution for filling a vacancy which occurs in the more typical case in which a vacancy creates an unexpired term. Ga.Const. art. 6, § 2, ¶ 3.[7] While executive appointment is not the exclu-

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[7] Ga.Const. art. 6, § 2, ¶ 3 provides, in pertinent part:

> The Justices [of the Georgia Supreme Court] . . . shall hold their offices for six years, and until their successors are qualified. They

sive means of filling a vacancy on the Georgia Supreme Court, and is not the method required in this case, the fact that the commission of an associate justice issues from the secretary of state and that replacement of an associate justice "may be supplied by executive appointment" brings this case within the reach of section 89-504. *Cf. Op. Ga. Att'y Gen. U74-29* (1974) (compliance with the commission requirement of section 89-504 suffices to bring sheriffs within the reach of this statute even though they are never replaced by executive appointment). Justice Bowles properly submitted his November letter of resignation to the governor and the governor properly accepted it.

In their fourth and fifth arguments, the Georgia officials make alternative challenges to two factual findings of the district court. They argue that the district court erred in concluding that when Justice Bowles sent his November letter, he intended to resign from his upcoming term beginning in January. Assuming that this was Bowles's intention in November, the Georgia officials also argue that the district court failed to recognize that he intended to rescind his prior resignation by taking the oath of office on December 15, 1980, and entering into the duties of the new term on January 5, 1981.

In considering these arguments, we are bound by Federal Rule of Civil Procedure 52(a) which states that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the oppor-

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shall be elected by the people at the same time and the same manner as members of the General Assembly. In case of any vacancy which causes an unexpired term, the same shall be filled by executive appointment, and the person appointed by the Governor shall hold his office until the next regular election, and until his successor for the balance of the unexpired term shall have been elected and qualified.

tunity of the trial court to judge of the credibility of the witnesses." Thus, factual findings of a district court cannot be set aside on review unless clearly erroneous. *Williamson v. Tucker*, 645 F.2d 404 (5th Cir. 1981). The function of a reviewing court is not to retry issues of fact or to substitute its judgment for that of the district court. *Dickens v. United States*, 545 F.2d 886 (5th Cir. 1977). A finding is reversible under rule 52(a) only when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948).

The district court summarized its factual conclusions as follows:

> In our view, the evidence establishes that Justice Bowles resigned his office, including his new term, on November 20, 1980, that the defendants had decided to replace the justice by appointment rather than by special election, and that the process by which the Governor selects and appoints justices to the appellate courts in Georgia had been initiated and was operating with the knowledge, consent, and cooperation of defendants Busbee and Bowles after November 20, 1980. To adopt the defendants' explanation for their actions would require a distortion of the facts . . . and the obvious intent of the parties. The alternative and less strained explanation—that Bowles inadvertently resigned at a time when a special election would be necessary to fill his position—is more logical and likely.

Before reaching this conclusion, the district court heard extensive evidence, including the testimony of Justice Bowles and Governor Busbee. The district court's carefully written opinion demonstrates the solicitude with which it considered the evidence and arguments offered by the Georgia officials. The district court carefully pointed

out that its conclusions were

> not based on the finding that defendants' objective was to disenfranchise the voters. It has been the custom in the executive office over the years to appoint judges, and this practice has, in fact, frequently redounded to the public's benefit in the selection of able and qualified members of the judiciary. In this instance, however, the presumption that the office would be filled by executive appointment and the desire to exercise the Governor's prerogative overrode the statutory obligation to call a special election, and resulted in an infringement of the plaintiffs' right to vote.

The record developed before the district court persuades us that it has fairly and correctly interpreted the actions and motives of the Georgia officials. We affirm its finding that on November 20, 1980, Justice Bowles intended to resign from his upcoming term and that on the next day the governor accepted his resignation with the understanding that it constituted a permanent resignation. We likewise affirm the finding of the district court that "there clearly was no change in Bowles' intention to leave the court, or in the Governor's intention to select his successor."

CONCLUSION

We reject each of the three arguments advanced in this appeal. First, we find no abuse of discretion in the refusal of the district court to abstain from hearing this section 1983 claim. Second, we hold that the due process clause of the fourteenth amendment affords protection against the disenfranchisement of a state electorate in violation of state election law. Third, we agree with the district court that the plain meaning of Georgia's special election statute, Ga.Code § 34-1514, requires the calling of a

special election under the circumstances of this case. The decision of the district court is affirmed.

AFFIRMED.

APPENDIX

On April 25, 1977, Jesse G. Bowles was appointed by Governor Busbee as an Associate Justice of the Supreme Court of Georgia. Justice Bowles was subsequently elected, on November 7, 1978, to fill a term of office as an Associate Justice until December 31, 1980. The justice encountered personal problems during his tenure on the court, however. Family arrangements required that the justice commute from Cuthbert in southern Georgia to Atlanta on a weekly basis, and the necessity and expense of supporting two homes caused financial and marital strain. The problems became so acute that, in October 1979, the justice met with Governor Busbee to discuss the possibility of resigning from the court. The Governor urged Justice Bowles to continue on the court at that time, and the justice agreed.

On June 11, 1980, Justice Bowles qualified to run in the Democratic primary for election to a full term on the court. Unfortunately, the justice's personal situation continued to deteriorate throughout 1980, and he continued seriously to consider resigning from the court. On August 5, 1980, Justice Bowles was nominated in the Democratic Party primary for election to the office of Associate Justice of the Supreme Court of Georgia.

In early August 1980, Bowles attempted to discuss the potential effects of his withdrawal from the race with someone at the Democratic Party headquarters. Receiving no useful information there, Bowles sought out Charles

Tidwell, the Governor's executive counsel in charge of judicial nominations, to explore the statutory provision, party rules, and prior practices regarding resignations from the court. The two men discussed the mechanics by which a substitute nominee would be chosen in the time periods preceding the general election as specified by statute. *See* Ga. Code § 34-1003. Tidwell told Bowles that the Governor would have some influence in the selection process, but would not be able to control it. Bowles asked Tidwell to review the election laws to determine the effect of his resignation.

In September 1980, Justice Bowles informed Tidwell that he was intending to resign. Bowles, Tidwell, and Busbee met on September 24 to discuss the justice's resignation. The three men discussed the possible procedural and political ramifications of various resignation dates. The three men testified that they were not aware of and did not discuss at that time the provision in the Georgia Code providing for a special election when an official elected at a general election withdraws before taking office. Ga. Code § 34-1514. Justice Bowles left the meeting with the Governor and Mr. Tidwell stating that he would not resign at that time.

Justice Bowles was reelected to office on November 4, 1980. Nevertheless, he continued to deliberate as to whether, when, and how he should resign. Charles Tidwell knew that the Judicial Nominating Commission [1] (Com-

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[1] The Judicial Nominating Commission is an independent commission created by Executive Order, responsible for soliciting and screening applicants for appointment to vacancies in the state courts. Defendants' Exhibits 1–5. The Commission consists of five *ex officio* members of the State Bar of Georgia, and five members appointed by the Governor from the public at large. The deliberations and nominations of the Commission are confidential.

mission), which screens applicants for appointment to the state court benches, would be meeting on December 11 and 12, 1980, to discuss candidates for appointment to the soon-to-be-vacant seat of George T. Smith on the Georgia Court of Appeals.[2] The Commission met infrequently, only at the Governor's request, and needed at least three weeks to distribute notices of a particular vacancy so that applicants would have a chance to respond and be considered at the next meeting. Aware of the Commission's time schedule and hoping to avoid duplicative effort by the Commission, Tidwell called Justice Bowles in an attempt to coordinate the Smith and Bowles resignations. Mr. Tidwell informed the justice that the last possible day to resign and trigger the nominating process for his seat would be November 20, 1980.

Justice Bowles wrote a letter of resignation dated November 20, 1980, and delivered it to Mr. Tidwell on that date. The letter did not include an effective date, however The two men discussed the omission, Mr. Tidwell advising the justice that the effective date was his decision. Justice Bowles then included the words "effective December 31, 1980" on the letter. Plaintiffs' Exhibit A. Mr. Tidwell informed the Commission that day to begin seeking and screening candidates for Justice Bowles' seat. The resignation was accepted by Governor Busbee by letter dated November 21, 1980.[3] Plaintiffs' Exhibit C.

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[2] George T. Smith ran for election to the Georgia Supreme Court while a member of the Georgia Court of Appeals, and was elected on November 4, 1980.

[3] Ga.Code § 89-504 provides:

> The resignations of Senators and Representatives in Congress, members of the General Assembly, and of all officers whose commissions issue from the office of Secretary of State, or the Executive Department, and whose places may be supplied by executive appointment, shall be made to the Governor.

Sometime prior to November 21, 1980, Justice Bowles had asked Charles Webb, administrative aide to the Chief Justice, to prepare a press release on his resignation, but to hold the release until notified by Justice Bowles. The justice wanted a release prepared to be sent to county weekly publications around Cuthbert, Georgia, where he planned to return to practice law. The press release was prepared on Supreme Court stationery and stated that Justice Bowles "has resigned to return to the private practice of law at Cuthbert," and that he had written Governor Busbee asking "that his resignation be made effective as of Dec. 31." Plaintiffs' Exhibit M. The story of the resignation had by this time been reported in the press, and Mr. Webb called the justice to suggest that the statement be released. The justice agreed. Mr. Webb read him the text of the statement over the phone, and it was dated and distributed on November 21, 1980.[4]

Chief Justice Undercofler also released a short statement on November 21, 1980, having been told by Justice Bowles the previous afternoon that he was leaving the court. Justice Undercofler stated that he "regrets that Justice Jesse G. Bowles has decided to leave the Supreme Court of Georgia." Plaintiffs' Exhibit N. Justice Undercofler testified that he fully expected Justice Bowles to take the oath of office on December 15, 1980, for his new term beginning in 1981, but conceded that he had no factual basis for his belief.

On November 24, 1980, Charles Tidwell met with Governor Busbee and told him that he was coordinating Justice Bowles' resignation with the Commission's sched-

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[4] Justice Bowles testified he did not read the statement before it was released. Otherwise, he would have deleted the final paragraph relating to his marriage.

ule. The two men discussed the recent news reports on the Justice's resignation and reviewed the special election law. Both were concerned about the expense of holding a special election and the likelihood of low voter turnout so soon after a general election.

Sometime after this meeting, Judge Quillian of the Georgia Court of Appeals called the Governor to request a speedy appointment of a replacement for the departing Judge George T. Smith. The Governor told him that he intended to wait and make a double appointment, simultaneously replacing both Judge Smith and Justice Bowles.

The plaintiffs began their quest for a special election shortly after reading in the newspapers of Justice Bowles' resignation from the court on November 20, 1980. Aware of the provision for special elections in the Georgia Code, and concerned that all appellate judges in the state currently serving were appointed rather than elected to their initial terms of office, plaintiffs wrote and hand delivered to Secretary Poythress on December 3, 1980, a letter requesting a special election. Plaintiffs' Exhibits E, X.

On December 4, 1980, Governor Busbee held a press conference. When asked at the conference if he would support a special election for Supreme Court justice, the Governor stated he would not on the ground that it would cost the state over one million dollars and probably result in a small voter turnout. That same day, one of the plaintiffs visited Justice Bowles at the Supreme Court to inquire of him whether he had resigned his office. The justice refused to answer the plaintiff's questions, however, telling her he would respond only through the "proper authorities" or "channels." On December 9, 1980, plaintiffs again wrote to Secretary Poythress because they had not yet received a response to their initial

inquiry concerning a special election. Plaintiffs' Exhibit G.

On December 15, 1980, plaintiffs met with Mr. Poythress who gave them, in writing, a response to their request for an election. The Secretary stated that he had received a letter dated December 5, 1980, which he had solicited from Charles Tidwell, the Governor's executive counsel, explaining that Justice Bowles' resignation effective December 31, 1980, was intended to apply only to his currently held term of office which would expire as a matter of law on December 31, 1980. Mr. Tidwell wrote to the Secretary that

> [w]hile it is only private supposition upon my part at this time, I would not be surprised if sometime after Justice Bowles assumes his newly elected office . . . he should resign. In anticipation of this eventuality, we have requested the Judicial Nominating Commission to initiate their screening processes of candidates to fill by executive appointment any vacancy which might occur.

Plaintiffs' Exhibit F. As a result of this letter, Secretary Poythress told the plaintiffs that "Justice Bowles' resignation, and the Governor's acceptance thereof, were intended by both men to relate to Justice Bowles' presently held commission which expires December 31, 1980." In addition, he stated that Justice Bowles had "verbally confirmed to [him] that such was his intention and that he does intend to enter upon the duties of the new term of office beginning on January 1, 1981." Plaintiffs' Exhibit H. Therefore, a special election would not be required. However, the defendants did not issue a public statement to correct the news reports that Justice Bowles was resigning from the Supreme Court as of December 31, 1980. Justice Bowles took the oath of office for his new term on December 15, 1980.

On the same day, December 15, the plaintiffs visited Mr. A. G. Cleveland, the head of the Governor's Judicial Nominating Commission. Mr. Cleveland told the plaintiffs that the Commission was working on a list of nominees to give to Governor Busbee as potential candidates for appointment to both Justice Bowles' seat on the Supreme Court and Judge Smith's seat on the Court of Appeals. On December 16, the plaintiffs read in the newspapers that Justice Bowles had, the day before, taken the oath of office for his new term beginning January 1, 1981. Believing that Justice Bowles intended to serve his new term, the plaintiffs abandoned their campaign for a special election.

At a meeting on December 17, Mr. Tidwell, who had picked up the list of nominees from the Commission the previous day, told the Governor that he could not fill Justice Bowles' seat until Bowles resigned his new commission sometime after January 1, 1981. The Governor interviewed candidates for both positions on December 18, and appointed Judge Smith's replacement, who was sworn in January 5, 1981.

According to his testimony, Justice Bowles continued actively to consider leaving the court throughout this period, but it was not until all hope of resolution of his personal problems had dissolved over the Christmas holidays that he decided on January 2, 1981 that he would make a final decision on January 5, his first day in his chambers in the new term. On the morning of January 5, Justice Bowles returned to the courthouse and called Hardy Gregory, Jr. to discuss Gregory's appointment and whether the new justice would like to interview Justice Bowles' staff or retain his parking place at the court building.

Around noon on January 5, Justice Bowles sent a letter of resignation to the Governor. The resignation was accepted in writing by the Governor on the same day. Plaintiff's Exhibits J, K. On January 6, the plaintiffs read in the newspapers that Justice Bowles had resigned his office effective immediately, and that the Governor had selected his successor. Governor Busbee administered the oath of office to Associate Justice Hardy Gregory, Jr. on January 8, 1981. On the following day the plaintiffs delivered to Secretary of State Poythress another letter demanding a special election. The plaintiffs received no response, and approximately three weeks later filed this suit.

PART II

APPELLATE COURT DENIAL OF REHEARING

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**
UNIT B

No. 81-7363

ELIZABETH B. DUNCAN, ET AL.,
Plaintiffs-Appellees,

versus

DAVID B. POYTHRESS, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion SEPTEMBER 28, 1981, 5 Cir., 198__, ____ F.2d ____).

(November 18, 1981)

Before FRANK M. JOHNSON, Jr., and HATCHETT, Circuit Judges, and SCOTT*, District Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the

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**Former 5th Circuit Case; (Section 9 (1) of Public Law 96-452, Oct 14, 1980)

*District Judge from the Northern District of Florida, sitting by designation

Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the judges in regular active service of this Administrative Unit having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of this Administrative Unit in active service having requested a poll on the reconsideration in this cause en banc, and a majority of the judges in active service of said unit not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ JOSEPH W. HATCHETT
United States Circuit Judge

CLERK'S NOTE:
SEE RULE 41 FRAP
AND LOCAL RULE
17 FOR STAY OF
THE MANDATE

PART III

JUDGMENT OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF GEORGIA

CIVIL ACTION FILE No. C81-199A

ELIZABETH B. DUNCAN
ELIZABETH N STOUT

vs.

DAVID B. POYTHRESS, as Secretary of State, State of Georgia
GEORGE D. BUSBEE, Individually and as Governor of State of Georgia
JESSE G. BOWLES
HARDY GREGORY, JR. as Associate Justice, Supreme Court of Georgia

JUDGMENT

April 29, 1981

This action came on for trial (hearing) before the Court, Honorable RICHARD C. FREEMAN, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered, Pursuant to Order of April 28, 1981

It is Ordered and Adjudged finding for the plaintiff and against the Defendant. That the Plaintiff, ELIZABETH B. DUNCAN, ELIZABETH N. STOUT, recover of the Defendant, DAVID B. POYTHRESS, as Secretary of State, State of Georgia, GEORGE D. BUSBEE, Individually and as Governor of State of Georgia, JESSE G. BOWLES, HARDY GREGORY, JR. as Associate Justice, Supreme Court of Georgia, $1.00 each in nominal damages for the denial of their constitutional rights to be paid by defendants; and That Plaintiffs shall recover from defendants all reasonable attorney's fees and the costs of this action.

* * * * * *

Dated at Atlanta, Georgia, this 28th. day of April, 1981.

Filed and entered in
Clerk's Office
April 29, 1981
BEN H. CARTER, Clerk

By: /s/ ALLEN NEWMAN
ALLEN NEWMAN,
Deputy Clerk

BEN H. CARTER (SEAL)
Clerk of Court

By: /s/ ALLEN NEWMAN
ALLEN NEWMAN,
Deputy Clerk

PART IV

DISTRICT COURT DECISION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ELIZABETH B. DUNCAN, ET AL.	CIVIL ACTION
vs.	
DAVID B. POYTHRESS, ET AL.	NO. 81-199 A

April 29, 1981

ORDER

Plaintiffs bring this civil rights action, 42 U.S.C. § 1983, alleging violations of the equal protection and due process clauses of the Fourteenth Amendment of the United States Constitution, in that they were denied the right to vote for Associate Justice of the Supreme Court of Georgia in a special election. They contend that defendants Governor George D. Busbee and former Associate Justice Jesse G. Bowles of the Supreme Court of Georgia manipulated the events surrounding Justice Bowles' resignation from the court to permit the Governor to appoint Bowles' successor. Plaintiffs also assert a pendant state claim of fraud. This court has jurisdiction pursuant to 28 U.S.C. § 1343.

Plaintiffs seek both declaratory and injunctive relief and damages. Plaintiffs ask that this court order that a special election be held to fill Justice Bowles' unexpired term on the Supreme Court, and that Justice Gregory, currently serving Justice Bowles' term, be enjoined from further serving that term and from running as an incum-

bent in the special election. Plaintiffs seek one million dollars in exemplary damages from defendants Bowles and Busbee to be paid into the state treasury to help finance the election. In addition, plaintiffs ask for one dollar each in compensatory damages for violation of their constitutional rights, and for attorney's fees and costs.

On February 26, 1981, the court accelerated trial on the merits with plaintiff's request for preliminary injunctive relief, and the case was tried to the court on March 26 and 27, 1981. Rule 65(a)(2), Fed. R. Civ. P. The following order shall serve as the court's findings of fact and conclusions of law. Rule 52(a), Fed. R. Civ. P.

I. STATEMENT OF THE FACTS

The Constitution of the State of Georgia provides for the popular election of state Supreme Court justices to six-year terms. If a vacancy occurs during an unexpired term,[1] however, the Governor appoints a successor.

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[1] Under Georgia law, a vacancy may occur by seven different means.

All offices in the State shall be vacated—
1. Death
By the death of the incumbent.
2. Resignation
By resignation, when accepted.
3. Judgment
By decision of a competent tribunal declaring the office vacant.
4. Incapacity
By voluntary act or misfortune of the incumbent, whereby he is placed in any of the specified conditions of ineligibility to office, which shall operate from the time the fact is ascertained and declared by the proper tribunal.
5. Nonresidence
By the incumbent ceasing to be a resident of the State, or of the county, circuit, or district for which he was elected. . . .

> The Justices . . . shall hold their offices for six years, and until their successors are qualified. They shall be elected by the people at the same time and the same manner as members of the General Assembly. In case of any vacancy which causes an unexpired term, the same shall be filled by executive appointment, and the person appointed by the Governor shall hold his office until the next regular election, and until his successor for the balance of the unexpired term shall have been elected and qualified. The returns of such elections shall be made to the Secretary of State, who shall certify the result to the Governor, and commission shall issue accordingly.

Ga. Code § 2-3103. The election law of Georgia also provides that whenever a person elected to a public office withdraws before taking office, the vacancy is to be filled by a special election called by the Secretary of State.

> Whenever any primary or election shall fail to fill a particular nomination or office and such failure cannot be cured by a run-off primary or election, or whenever any person elected to public office shall die or withdraw prior to taking office, or whenever any person elected to public office shall fail validly to take that office, then the authority, with whom the candidates for such nomination or office filed their notice of candidacy, shall thereupon call a special primary or election to fill such position.

Ga. Code § 34-1514. The plaintiffs predicate their constitutional claims on these provisions, contending that a special election should have been called to elect a new

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6. Failing to obtain commission or give bond
By failing to apply for and obtain commissions or certificates, or by failing to qualify or give bond, or both, within the time prescribed by the laws and Constitution.
7. Abandonment of office
By abandoning the office and ceasing to perform its duties, or either.

justice to the court after November 20, 1980, when Justice Bowles resigned his seat effective December 31, 1980. The facts from which this claim arose are set out in full below.

Plaintiffs are registered voters in Fulton County and DeKalb County, Georgia. Defendants are George D. Busbee, Governor of the State of Georgia; Jesse G. Bowles, former Associate Justice of the Supreme Court of Georgia; Hardy Gregory, Jr., Associate Justice of the Supreme Court of Georgia; and David B. Poythress, Secretary of State, State of Georgia. Defendants Gregory and Poythress were joined as defendants in this action solely for the purpose of affording plaintiffs complete relief.

On April 25, 1977, Jesse G. Bowles was appointed by Governor Busbee as an Associate Justice of the Supreme Court of Georgia. Justice Bowles was subsequently elected, on November 7, 1978, to fill a term of office as an Associate Justice until December 31, 1980. The justice encountered personal problems during his tenure on the court, however. Family arrangements required that the justice commute from Cuthbert in southern Georgia to Atlanta on a weekly basis, and the necessity and expense of supporting two homes caused financial and marital strain. The problems became so acute that, in October 1979, the justice met with Governor Busbee to discuss the possibility of resigning from the court. The Governor urged Justice Bowles to continue on the court at that time, and the justice agreed.

On June 11, 1980, Justice Bowles qualified to run in the Democratic primary for election to a full term on the court. Unfortunately, the justice's personal situation continued to deteriorate throughout 1980, and he continued seriously to consider resigning from the court. On

August 5, 1980, Justice Bowles was nominated in the Democratic Party primary for election to the office of Associate Justice of the Supreme Court of Georgia.

In early August 1980, Bowles attempted to discuss the potential effects of his withdrawal from the race with someone at the Democratic Party headquarters. Receiving no useful information there, Bowles sought out Charles Tidwell, the Governor's executive counsel in charge of judicial nominations, to explore the statutory provision, party rules, and prior practices regarding resignations from the court. The two men discussed the mechanics by which a substitute nominee would be chosen in the time periods preceding the general election as specified by statute. *See* Ga. Code § 34-1003. Tidwell told Bowles that the Governor would have some influence in the selection process, but would not be able to control it. Bowles asked Tidwell to review the election laws to determine the effect of his resignation.

In September 1980, Justice Bowles informed Tidwell that he was intending to resign. Bowles, Tidwell, and Busbee met on September 24 to discuss the justice's resignation. The three men discussed the possible procedural and political ramifications of various resignation dates. The three men testified that they were not aware of and did not discuss at that time the provision in the Georgia Code providing for a special election when an official elected at a general election withdraws before taking office. Ga. Code § 34-1514. Justice Bowles left the meeting with the Governor and Mr. Tidwell stating that he would not resign at that time.

Justice Bowles was reelected to office on November 4, 1980. Nevertheless, he continued to deliberate as to whether, when, and how he should resign. Charles Tidwell

knew that the Judicial Nominating Commission [2] (Commission), which screens applicants for appointment to the state court benches, would be meeting on December 11 and 12, 1980, to discuss candidates for appointment to the soon-to-be-vacant seat of George T. Smith on the Georgia Court of Appeals.[3] The Commission met infrequently, only at the Governor's request, and needed at least three weeks to distribute notices of a particular vacancy so that applicants would have a chance to respond and be considered at the next meeting. Aware of the Commission's time schedule and hoping to avoid duplicative effort by the Commission, Tidwell called Justice Bowles in an attempt to coordinate the Smith and Bowles resignations. Mr. Tidwell informed the justice that the last possible day to resign and trigger the nominating process for his seat would be November 20, 1980.

Justice Bowles wrote a letter of resignation dated November 20, 1980, and delivered it to Mr. Tidwell on that date. The letter did not include an effective date, however. The two men discussed the omission, Mr. Tidwell advising the justice that the effective date was his decision. Justice Bowles then included the words "effective December 31, 1980" on the letter. Plaintiffs' Exhibit A. Mr. Tidwell informed the Commission that day to begin seeking and screening candidates for Justice Bowles'

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[2] The Judicial Nominating Commission is an independent commission created by Executive Order, responsible for soliciting and screening applicants for appointment to vacancies in the state courts. Defendants' Exhibits 1–5. The Commission consists of five *ex officio* members of the State Bar of Georgia, and five members appointed by the Governor from the public at large. The deliberations and nominations of the Commission are confidential.

[3] George T. Smith ran for election to the Georgia Supreme Court while a member of the Georgia Court of Appeals, and was elected on November 4, 1980.

seat. The resignation was accepted by Governor Busbee by letter dated November 21, 1980.[4] Plaintiffs' Exhibit C.

Sometime prior to November 21, 1980, Justice Bowles had asked Charles Webb, administrative aide to the Chief Justice, to prepare a press release on his resignation, but to hold the release until notified by Justice Bowles. The justice wanted a release prepared to be sent to county weekly publications around Cuthbert, Georgia, where he planned to return to practice law. The press release was prepared on Supreme Court stationary and stated that Justice Bowles "has resigned to return to the private practice of law at Cuthbert," and that he had written Governor Busbee asking "that his resignation be made effective as of Dec. 31." Plaintiffs' Exhibit M. The story of the resignation had by this time been reported in the press, and Mr. Webb called the justice to suggest that the statement be released. The justice agreed. Mr. Webb read him the text of the statement over the phone, and it was dated and distributed on November 21, 1980.[5]

Chief Justice Undercofler also released a short statement on November 21, 1980, having been told by Justice Bowles the previous afternoon that he was leaving the court. Justice Undercofler stated that he "regrets that Justice Jesse G. Bowles has decided to leave the Supreme Court of Georgia." Plaintiffs' Exhibit N. Justice Undercofler testified that he fully expected Justice Bowles to

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[4] Ga. Code § 89-504 provides:

> The resignations of Senators and Representatives in Congress, members of the General Assembly, and of all officers whose commissions issue from the office of Secretary of State, or the Executive Department, and whose places may be supplied by executive appointment, shall be made to the Governor.

[5] Justice Bowles testified he did not read the statement before it was released. Otherwise, he would have deleted the final paragraph relating to his marriage.

take the oath of office on December 15, 1980, for his new term beginning in 1981, but conceded that he had no factual basis for his belief.

On November 24, 1980, Charles Tidwell met with Governor Busbee and told him that he was coordinating Justice Bowles' resignation with the Commission's schedule. The two men discussed the recent news reports on the justice's resignation and reviewed the special election law. Both were concerned about the expense of holding a special election and the likelihood of low voter turnout so soon after a general election.

Sometime after this meeting, Judge Quillian of the Georgia Court of Appeals called the Governor to request a speedy appointment of a replacement for the departing Judge George T. Smith. The Governor told him that he intended to wait and make a double appointment, simultaneously replacing both Judge Smith and Justice Bowles.

The plaintiffs began their quest for a special election shortly after reading in the newspapers of Justice Bowles' resignation from the court on November 20, 1980. Aware of the provision for special elections in the Georgia Code, and concerned that all appellate judges in the state currently serving were appointed rather than elected to their initial terms of office, plaintiffs wrote and hand delivered to Secretary Poythress on December 3, 1980, a letter requesting a special election. Plaintiffs' Exhibits E, X.

On December 4, 1980, Governor Busbee held a press conference. When asked at the conference if he would support a special election for Supreme Court justice, the Governor stated he would not on the ground that it would cost the state over one million dollars and probably result in a small voter turnout. That same day, one of the plaintiffs visited Justice Bowles at the Supreme Court to

inquire of him whether he had resigned his office. The justice refused to answer the plaintiff's questions, however, telling her he would respond only through the "proper authorities" or "channels." On December 9, 1980, plaintiffs again wrote to Secretary Poythress because they had not yet received a response to their initial inquiry concerning a special election. Plaintiffs' Exhibit G.

On December 15, 1980, plaintiffs met with Mr. Poythress who gave them, in writing, a response to their request for an election. The Secretary stated that he had received a letter dated December 5, 1980, which he had solicited from Charles Tidwell, the Governor's executive counsel, explaining that Justice Bowles' resignation effective December 31, 1980, was intended to apply only to his currently held term of office which would expire as a matter of law on December 31, 1980. Mr. Tidwell wrote to the Secretary that

> [w]hile it is only private supposition upon my part at this time, I would not be surprised if sometime after Justice Bowles assumes his newly elected office . . . he should resign. In anticipation of this eventuality, we have requested the Judicial Nominating Commission to intiate their screening processes of candidates to fill by executive appointment any vacancy which might occur.

Plaintiffs' Exhibit F. As a result of this letter, Secretary Poythress told the plaintiffs that "Justice Bowles' resignation, and the Governor's acceptance thereof, were intended by both men to relate to Justice Bowles' presently held commission which expires December 31, 1980." In addition, he stated that Justice Bowles had "verbally confirmed to [him] that such was his intention and that he does intend to enter upon the duties of the new term of office beginning on January 1, 1981." Plaintiffs' Exhibit

H. Therefore, a special election would not be required. However, the defendants did not issue a public statement to correct the news reports that Justice Bowles was resigning from the Supreme Court as of December 31, 1980. Justice Bowles took the oath of office for his new term on December 15, 1980.

On the same day, December 15, the plaintiffs visited Mr. A. G. Cleveland, the head of the Governor's Judicial Nominating Commission. Mr. Cleveland told the plaintiffs that the Commission was working on a list of nominees to give to Governor Busbee as potential candidates for appointment to both Justice Bowles' seat on the Supreme Court and Judge Smith's seat on the Court of Appeals. On December 16, the plaintiffs read in the newspapers that Justice Bowles had, the day before, taken the oath of office for his new term beginning January 1, 1981. Believing that Justice Bowles intended to serve his new term, the plaintiffs abandoned their campaign for a special election.

At a meeting on December 17, Mr. Tidwell, who had picked up the list of nominees from the Commission the previous day, told the Governor that he could not fill Justice Bowles' seat until Bowles resigned his new commission sometime after January 1, 1981. The Governor interviewed candidates for both positions on December 18, and appointed Judge Smith's replacement, who was sworn in January 5, 1981.

According to his testimony, Justice Bowles continued actively to consider leaving the court throughout this period, but it was not until all hope of resolution of his personal problems had dissolved over the Christmas holidays that he decided on January 2, 1981 that he would make a final decision on January 5, his first day in his

chambers in the new term. On the morning of January 5, Justice Bowles returned to the courthouse and called Hardy Gregory, Jr. to discuss Gregory's appointment and whether the new justice would like to interview Justice Bowles' staff or retain his parking place at the court building.

Around noon on January 5, Justice Bowles sent a letter of resignation to the Governor. The resignation was accepted in writing by the Governor on the same day. Plaintiff's Exhibits J, K. On January 6, the plaintiffs read in the newspapers that Justice Bowles had resigned his office effective immediately, and that the Governor had selected his successor. Governor Busbee administered the oath of office to Associate Justice Hardy Gregory, Jr. on January 8, 1981. On the following day the plaintiffs delivered to Secretary of State Poythress another letter demanding a special election. The plaintiffs received no response, and approximately three weeks later filed this suit.

In sum, the facts of this case are not genuinely disputed by the parties. As to the motivations which hold these facts together in a pattern, however, the parties have very different views. Plaintiffs paint a picture of political chicanery and intrigue, in which defendants Busbee and Bowles purposefully orchestrated their actions to defraud plaintiffs and deprive them of their right to vote in a special election. On the other hand, the defendants' contention that because Justice Bowles intended to resign only for one day—December 31, 1980, the day on which his term naturally expired [4]—a vacancy on the court was

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[4] Neither the Governor nor Mr. Cleveland, head of the Judicial Nominating Commission, could recall, however, another instance in which a state appellate judge had announced an intention to resign his commission for only one day.

never created and the need for a special election never arose, is at best contrived. Although we find that the truth is somewhere in between, we believe that the plaintiffs' constitutional rights have been violated, and that they are entitled, at least partially, to the relief they seek.

II. PRELIMINARY ISSUES

A. Abstention

Defendants contend that the court should abstain in this matter. The basis of their argument is that a definitive state court interpretation of the special election statute would resolve the constitutional question presented in this case. Defendants claim that a special election is required only when an elected candidate "withdraws" before taking office. Ga. Code § 34-1514. The question of whether Justice Bowles' November 20, 1980 "recignation" constituted a "withdrawal" is, therefore, a question of statutory construction, the resolution of which would obviate the constitutional issues.

The Supreme Court in *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), established three factors for the district court to consider in deciding whether to abstain:

> (1) whether the disposition of a question of state law involved in the case can eliminate or narrow the scope of the federal constitutional issues; (2) whether the state law question presents difficult, obscure or unclear issues of state law; and (3) whether a federal decision could later conflict with subsequent state court reso-

> lutions concerning the same regulatory program or scheme. . . .

High Ol' Times, Inc. v. Busbee, 621 F.2d 135, 139 (5th Cir. 1980). "[A]bstention cannot be ordered," however, "simply to give state courts the first opportunity to vindicate the federal claim." *Zwickler v. Koota*, 389 U.S. 241, 250 (1967).

We do not find this to be an appropriate case for abstention. Plaintiffs claim that they have been denied the right to vote. They do not challenge the state statute governing special elections, but contend only that it has been applied in an unconstitutional manner. A state court interpretation of the special election law, which is clear on its face, would not substantially alter the federal claim presented to this court for resolution. It would defeat the purposes of the Civil Rights Act if the "assertion of a federal claim in federal court must await an attempt to vindicate the same claim in state court." *McNeese v. Board of Education*, 373 U.S. 668, 672 (1963). *See Smith v. Cherry*, 489 F.2d 1098 (7th Cir. 1973), *cert. denied*, 417 U.S. 910 (1974). This court will not abstain from considering the merits of plaintiffs' claim.

B. Mandamus

Defendants also assert that plaintiffs should have sought mandamus relief in state court against Secretary Poythress prior to filing this federal action, and therefore have no right to a special election at this time. In Georgia, mandamus lies against a public officer to require the performance of a duty to which the plaintiff has a clear legal right. *Crow v. McCallum*, 215 Ga. 692, 113 S.E.2d 203 (1960). The thrust of defendants' rather novel argument appears to be that because plaintiffs acknowledge that they had no right to mandamus the Secretary to call a special election after Justice Bowles took the oath of office for his new term on December 15, 1980, they therefore concede that they have no right to a special election, and this court cannot grant plaintiffs the remedy they seek. Defendants' Final Brief, filed April 7, 1981 at 2.

Defendants' argument has little substance. The remedy of mandamus was, in fact, not available to the plaintiffs due to Justice Bowles' taking the oath of office for the new term and Justice Gregory's appointment on January 6, 1981.[7] The plaintiffs' acknowledgement that mandamus was unavailable is not, however, a concession that they have no federal claim or no right to a special election. This argument must be rejected. *See Monroe v. Pape*, 365 U.S. 167, 183 (1961).

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[7] The Supreme Court of Georgia has held that "[m]andamus is available as a remedy where the duty to be enforced is one 'which exists at the time when the application for mandamus is made or the writ is granted.'" *City of Atlanta v. League of Women Voters, Inc.*, 244 Ga. 796, 262 S.E.2d 77, 79 (1979).

III. CONSTITUTIONAL ISSUES

A. The Right to Vote

Although the United States Constitution confers no right to vote as such, it does guarantee to every citizen the right to participate on a fair and equal basis with all other citizens in the electoral process once a state has chosen to select its public officials by popular vote. "Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as federal elections." *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). The right to vote is federally protected because it is "preservative of other basic civil and political rights. . . ." *Id.* at 562. "To the extent a citizen's right to vote is debased, he is that much less a citizen." *Id.* at 566. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. at 555.

The right to vote is clearly fundamental, and is protected by both the due process, *see, e.g., Williams v. Rhodes*, 393 U.S. 23, 43 (1968) (Harlan, J., concurring); *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978), and equal protection, *see, e.g., Williams v. Rhodes*, 393 U.S. at 38 (Douglas, J., concurring); *Weisberg v. Powell*, 417 F.2d 388 (7th Cir. 1969), guarantees of the Fourteenth Amend-

ment. In either case, "any alleged infringement of the right to vote must be carefully and meticulously scrutinized," *Reynolds v. Sims*, 377 U.S. at 562, for "a state has precious little leeway in making it difficult for citizens to vote. . . ." *Williams v. Rhodes*, 393 U.S. at 39. To survive strict judicial scrutiny, any state encroachment on the right to vote must be justified by a compelling state interest. *See Dunn v. Blumstein*, 405 U.S. 330 (1972).

B. **Sufficiency of the Plaintiffs' Complaint**

The Constitution confers upon the states the "power to control the disposition of contests over elections to . . . state and local offices." *Hubbard v. Ammerman*, 465 F.2d 1169, 1176 (5th Cir. 1972), *cert. denied*, 410 U.S. 910 (1973). The federal courts are neither empowered nor equipped to supervise the administration of local elections. *See generally Oregon v. Mitchell*, 400 U.S. 112 (1970). Accordingly, not every election irregularity gives rise to a constitutional claim cognizable under section 1983. As the Fifth Circuit recently observed,

> the determination that particular conduct constitutes a constitutional deprivation rather than a lesser legal wrong depends on the nature of the injury, whether it was inflicted intentionally or accidentally, whether it is part of pattern [sic] that erodes the democratic process or whether it is more akin to a negligent failure properly to carry out the state ordained electoral process. . . .

Gamza v. Aguirre, 619 F.2d 449, 453 (5th Cir. 1980), *citing Baker v. McCollan*, 443 U.S. 137 (1979).

Section 1983 claims have been sustained on allegations of "dilution of votes by reason of malapportioned voting

districts or weighted voting systems . . . ; purposeful or systematic discrimination against voters of a certain class, . . . geographic area, . . . or political affiliation . . . ; election frauds . . . ; and other wilful conduct which undermines the organic processes by which candidates are elected. . . ." *Hennings v. Grafton*, 523 F.2d 861, 864 (7th Cir. 1975). The federal courts have refused to interfere, however, when the record established mere irregularities caused by mechanical or human errors attending the use of a new voting machine system, *see id.*, or when a number of non-party members were permitted to vote in a close primary election by mistake, *see Powell v. Power*, 436 F.2d 84 (2d Cir. 1970). Although no precise line can be drawn between state action which will prompt a federal court to grant relief and that which will not, federal court intervention is more likely when the attack is on "an officially-sponsored election procedure which, in its basic aspect, was flawed," than when the court is "asked to count and validate ballots and enter into the details of the administration of the election." *Griffin v. Burns*, 570 F.2d at 1078.

In this case, the plaintiffs contend that the defendants manipulated events to deprive them of their right, granted by the Constitution and laws of the state of Georgia, to vote to fill a vacancy on the Georgia Supreme Court. This court can conceive of no more fundamental flaw in the electoral process than the deprivation of the right to vote altogether. We conclude that, when evaluated in light of the appropriate legal standard, the plaintiffs' allegations state a claim for relief under section 1983.

C. The Plaintiffs' Constitutional Claim

The right to vote, which encompasses "such distinct concerns as the citizen's opportunity to cast a vote, the

community's chance to be represented within a larger polity in proportion to its population, the racial group's ability to prevent the purposeful dilution of its voting power, the candidate's capacity to ensure a place on the ballot, and the constituent's chance to contribute to a chosen candidate," L. Tribe, *American Constitutional Law* 737 (1978), implicates fundamental First Amendment and due process interests and is therefore protected, at least in part, by the due process and equal protection guarantees of the Fourteenth Amendment against state encroachment. If the right is denied altogether or abridged in a manner which renders the electoral process fundamentally unfair, a violation of due process may be found. If, on the other hand, the state discriminates in favor of some members of the electorate and against others, the equal protection guarantee may have been violated. Where, as here, the plaintiffs' allegations can be construed as either a total abridgement of the electorate's vested suffrage, or a scheme designed to enhance the suffrage of the conspiring defendants at the expense of the rest of the electorate, the plaintiffs could arguably state a cause of action under either clause. For the reasons that follow, however, we conclude that the plaintiffs' claim may more appropriately be predicated on a violation of due process.

1. **Equal Protection**

With respect to voting and other rights related to the electoral process, it is, as Professor Tribe observes, the equality with which they are made available that is often crucial. Thus, the equal protection clause has been held to guarantee to each citizen a right to equal treatment with respect to voting. *See* L. Tribe, *American Constitutional Law* 737, 992 (1978). As the Supreme Court has observed, "this Court has made clear that a citizen has a

constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. at 336. Of course, this right is not absolute for the states have the power "to determine the conditions under which the right of suffrage may be exercised . . . , absent . . . the discrimination which the constitution condemns." *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45, 50-51 (1959).

In determining whether state action is impermissibly discriminatory in violation of the equal protection clause, the court looks to three factors: "the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification." *Dunn v. Blumstein*, 405 U.S. at 335. To survive strict scrutiny, the court must find that the classification is reasonably necessary to promote a compelling state interest. *See, e.g., Kramer v. Union Free School District*, 395 U.S. 621 (1969). Under this standard, the Court has invalidated state restrictions on the franchise based on race, *Nixon v. Herndon*, 273 U.S. 536 (1927); geographic location, *Moore v. Ogilvie*, 394 U.S. 814 (1969); poverty, *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966); political beliefs or party affiliation, *Williams v. Rhodes*, 393 U.S. 23; length of residency, *Dunn v. Blumstein*, 405 U.S. 330; and ownership of taxable property, *Cipriano v. City of Houma*, 395 U.S. 701 (1969).

Not all classifications of citizens, however, are proscribed by the Fourteenth Amendment: only invidious discrimination is prohibited. "The Equal Protection Clause of the Fourteenth Amendment permits the States to make classifications and does not require them to treat different groups uniformly." *Williams v. Rhodes*, 393 U.S. at 39 Although no clear statement of the classifications which

will be found constitutionally offensive emerges from the cases, when so fundamental a right as voting is concerned, the courts have not hesitated to conclude that any conduct which favors the "ins" against the "outs" is impermissible. For example, a denial of equal protection was found when a state official guaranteed his friends favored positions on the ballot. *Weisberg v. Powell*, 417 F.2d 388 (7th Cir. 1969). And, in *Smith v. Cherry*, 489 F.2d at 1102, the court held that the defendants' scheme to use a sham candidate to shift to themselves the power to select their party's nominee constituted a violation of the equal protection guarantee because it worked "in favor of the ins and against the outs." Finally, in *White v. Snear*, 313 F. Supp. 1100 (E.D. Pa. 1970), the court found the conduct of the defendant county commissioners, who were also members of the Republican Board of Supervisors for the county, in giving their employees the day off to electioneer for the party's endorsed candidates to be a denial of equal protection. The court noted that the

> effect of defendants' conduct is to favor a certain segment of a political party and to perpetuate its power through an abuse of authority conferred upon defendants by the state. By doing so, they discriminate against all other segments and candidates within that party. A clearer violation of the Equal Protection Clause would be difficult to imagine.

Id. at 1104.

These rulings might be extended to support an equal protection claim by the plaintiffs here: the defendants' conduct effectively vested the franchise in a class of two, Governor Busbee and Justice Bowles, thereby impermissibly discriminating against the rest of the electorate. However, that contention stretches the equal protection doctrine past its logical limits. As the Seventh Circuit

has observed, the "gravamen of equal protection lies not in the fact of deprivation of a right but in the invidious classification of persons aggrieved by the state's action." *Briscoe v. Kusper*, 435 F.2d 1046, 1052 (7th Cir. 1970). The gist of the plaintiffs' complaint is a denial of the right to vote altogether, not an invidious classification of potential voters.[8] In our view, neither the plaintiffs' interests nor the coherent development of equal protection doctrine would be served by our straining to construe the plaintiffs' claim as one for denial of equal protection of the laws. That is especially true here, where the plaintiffs may secure redress under the due process clause, which protects fundamental rights against infringement regardless of the motivation of, or the classifications made by, the state defendants. *See, e.g., Williams v. Rhodes*, 393 U.S. at 41-43 (Harlan, J., concurring).

2. Due Process

It is well settled that the interests encompassed by the right to vote are among the liberties protected against state infringement by the due process guarantee. If "the election process itself reaches the point of patent and fundamental unfairness, a violation of the due process clause may be indicated and relief under § 1983 therefore is in order." *Griffin v. Burns*, 570 F.2d at 1077. Thus, the retroactive invalidation of absentee and shut-in ballots

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[8] We note that the plaintiffs in the instant action are voters only There is no candidate or aspiring candidate who is joined as a plaintiff. Although voters' and candidates' interests overlap under the First Amendment, an unlawful classification of the "ins" versus the "outs" under the equal protection clause is more logically found where one of the plaintiffs is a candidate allegedly excluded from running for office by the defendant's actions. *See, e.g., Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978); *Smith v. Cherry*, 489 F.2d 1098 (7th Cir. 1973).

cast in a primary election was held to be constitutionally impermissible. *See id.* In another instance, when the local Democratic committee offered a sham candidate, who resigned upon winning the nomination so that the committee could name the party's nominee, the court held that the defendants' actions "clearly debased the rights of all voters in the election. Such an abridgement of the right to vote is impermissible and evinces the sufficiency of this [section 1983] complaint." *Smith v. Cherry*, 489 F.2d at 1102.

Moreover, federal relief is warranted whenever broad-gauged unfairness permeates the election process, even if it derives from apparently neutral action. *See Ury v. Santee*, 303 F. Supp. 119 (N.D. Ill. 1969). As the Supreme Court noted in *Monroe v. Pape*, 365 U.S. at 187, in holding that a section 1983 action for violation of rights secured by the due process clause need not be predicated on a showing of wilful conduct, the statute "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."

To prevail on their due process claim, the plaintiffs must establish that the defendants' actions deprived them of a right to vote in a special election to fill Justice Bowles' seat on the Supreme Court of Georgia. Under Georgia law, when a vacancy occurs during a justice's term of office, the seat is filled by executive appointment, Ga. Code § 2-3103, but when the vacancy occurs after a general election and prior to the commencement of the term, the seat is filled by a special election called for that purpose, Ga. Code § 34-1514. Thus, if Justice Bowles had taken no steps to leave the court prior to his resignation on January 5, 1981, Governor Busbee would clearly have been empowered to appoint his successor. Or, if Justice

Bowles had withdrawn on November 20, 1980, and not taken the oath of office for his new term, it seems clear that a special election would have been called to select his successor.

Our task would appear, then, to be relatively simple: determining whether Justice Bowles' seat became vacant prior to the commencement of his new term. The defendants conceded that Justice Bowles' November 20, 1980 letter had the effect of leaving his seat on the court vacant for at least one day—December 31, 1980—but, however, assert a number of arguments to avoid the conclusion which naturally flows from that concession. The defendants contend that Justice Bowles' November 20, 1980 resignation applied only to the term he then held and that he intended at all times to take the oath for, and enter upon the duties of, his new term. Moreover, they assert that Justice Bowles could not have resigned his new term on November 20, 1980, that a separate, distinct act of withdrawal would have been necessary to forfeit his right to take office for the new term. Finally, defendants contend that even if Justice Bowles resigned from his future term of office, that resignation was rescinded when he was sworn in on December 15, 1980 and commenced his duties after January 1, 1981. For the reasons that follow, we find these contentions unpersuasive.

First, we do not believe that the law contemplates or requires serial or multiple resignations for an incumbent office-holder who has been reelected to resign his position. The statute provides that any state office may be vacated "[b]y resignation, when accepted." Ga. Code § 89-501(2). Resignations of justices of the Supreme Court, like those of other officers whose commissions issue from the Secretary of State's office and whose offices may be filled by

executive appointment, "shall be made to the Governor." Ga. Code § 89-504. Therefore, an incumbent state officer properly resigns whatever term he has remaining by letter to the Governor. Neither the statute nor common sense requires that an office-holder who has been elected to, but not yet entered upon, a new term submit two letters of resignation. One resigns from an office, not a term of office.

Second, the defendants make much of the language of the special election statute which requires a special election "whenever any person elected to public office shall die or withdraw prior to taking office. . . ." Ga. Code § 34-1514. They contend that a withdrawal, not a resignation, is necessary to invoke the statute. In our view, this contention is without merit. Although the statute specifies only death and withdrawal as events which trigger a special election, it seems clear that the legislature meant, by withdrawal, any voluntary vacating of the position to which one had been elected. The ordinary, logical means by which an incumbent voluntarily leaves office is by resignation. Therefore, if the statute is to serve its intended purpose, its language must be construed to encompass resignations. Moreover, we note that the defendants' awareness of the now assertedly crucial distinction between withdrawal and resignation appears to be of recent origin. By their own testimony, the defendants were unaware of the difference at the time Justice Bowles submitted his first resignation letter on November 20, 1980, and they failed to make the point during their depositions in this matter in early March 1981. Nor have the defendants cited us to any cases supporting their construction of the statute. In these circumstances, we decline to superimpose a technical requirement of "withdrawal" on the facially clear special election statute.

Furthermore, the defendants' contention that Justice Bowles intended to resign only from the term he was then serving is neither logical nor, when viewed in light of all the evidence, credible. While it is unusual for any public official who intends to continue holding office to submit a letter of resignation, it is extremely odd, as the defendants concede, for a resignation allegedly applicable only to that official's current term to be effective on the day that term would naturally expire as a matter of law. On the other hand, an official who intends to give up his office altogether might very well make his resignation effective on the last day of his present term since that is a logical and convenient termination date.

The defendants' actions also support the conclusion that they treated Justice Bowles' November 20, 1980 resignation as a decision to leave the court on the last day of the term or as a withdrawal from his office, not as a resignation of the last day of his term only. The Governor, Justice Bowles, and Charles Tidwell considered and discussed the timing of the justice's impending resignation at meetings in the Fall of 1980. With the aid of the Governor's office, Bowles timed his resignation expressly to assist the Commission and the Governor in choosing his successor. The Governor's office initiated the Commission's search for Bowles' replacement, interviewed candidates, and apparently chose his successor before Bowles' second resignation was tendered on January 5, 1981. After the plaintiffs' initiated their efforts, Busbee and Tidwell familiarized themselves with and discussed the special election statute at a meeting on November 24, 1980. The Governor subsequently stated at his December 4, 1980 press conference that he did not favor a special election to fill Justice Bowles' seat on the Supreme Court

because of the cost involved and the probable low voter turnout, although he did announce that a special election would be held to fill the office of District Attorney for Bibb County.

Nor do Justice Bowles' own actions provide any greater support for the defendants' contention. At no point after the two press releases were issued by the Supreme Court on November 21, 1980 did Justice Bowles attempt to correct the alleged misconception, by then widespread among the media and the public, that he would be leaving office on December 31, 1980. Nor did he at any time request that the Governor halt the Commission's search for his successor. Finally, although the defendants testified that on the morning of January 5, 1981, Justice Bowles had not yet decided to resign, Governor Busbee had no knowledge of his imminent resignation, and Hardy Gregory had not had contact with the Governor since his December interview, Justice Bowles called Gregory, his replacement, that morning to discuss the transition.

Finally, the defendants contend that even if Justice Bowles resigned his office on November 20, 1980, he rescinded that resignation by taking the oath of office on December 15, 1980, and briefly entering upon his duties. We find that argument unpersuasive. Other than the acts specified, the defendants presented no evidence that Bowles intended to rescind his earlier withdrawal by taking the oath of office, or that the Governor consented to that rescission. The Judicial Nominating Comission [*sic*] was not notified to cease its search for his replacement, and the Governor's office picked up the list of nominees the day after the justice took the oath. Candidates were interviewed and Bowles' successor was chosen shortly thereafter. There clearly was no change in Bowles' inten-

tion to leave the court, or in the Governor's intention to select his successor. When considered in light of the evidence, Bowles' taking the oath of office for his new term is more logically seen as an effort to ensure the appointment of his successor than as a genuine reconsideration of his decision to leave the court.

In our view, the evidence establishes that Justice Bowles resigned his office, including his new term, on November 20, 1980, that the defendants had decided to replace the justice by appointment rather than by special election, and that the process by which the Governor selects and appoints justices to the appellate courts in Georgia had been initiated and was operating with the knowledge, consent, and cooperation of defendants Busbee and Bowles after November 20, 1980. To adopt the defendants' explanation for their actions would require a distortion of the facts, the statutes, and the obvious intent of the parties. The alternative and less strained explanation—that Bowles inadvertently resigned at a time when a special election would be necessary to fill his position—is more logical and likely. We conclude that the defendants' actions had the substantial effect of depriving the plaintiffs of their right to vote, and thus constituted a denial of due process.

Although the evidence establishes a constitutional violation, this court emphasizes that our conclusion is not based on a finding that the defendants' objective was to disenfranchise the voters. It has been the custom in the executive office over the years to appoint judges, and this practice has, in fact, frequently redounded to the public's benefit in the selection of able and qualified members of the judiciary. In this instance, however, the presumption that the office would be filled by appointment and the

desire to exercise the Governor's prerogative overrode the statutory obligation to call a special election, and resulted in an infringement of the plaintiffs' right to vote.

IV. RELIEF

A. Declaratory and Injunctive Relief

Plaintiffs seek (1) a declaration that their constitutional rights have been violated, (2) an order requiring that a special election be held, (3) an order enjoining Justice Gregory from further serving on the court, and (4) an order enjoining Justice Gregory from running in the election as an incumbent.[9] Having concluded that plaintiffs have properly alleged and proved the section 1983 claim, we declare that plaintiffs' constitutional rights have been violated by defendants' actions, and that they are entitled to equitable relief.

The granting of equitable relief always involves a balancing of the interests at stake. Defendants argue that a special election would cost the state an estimated one million dollars. In addition, enjoining defendant Gregory from further service on the court pending the outcome of a special election would disrupt the court's work and disserve the public interest.

The plaintiffs have been deprived of a valuable and fundamental right. In this instance, the court concludes that the proper remedy is to order that a special election for Associate Justice of the Georgia Supreme Court be held. The cost to the state of holding the election certainly is, or should be, a matter of concern for all citizens of this

[9] Justice Gregory testified that he sold his home in Cordele, Georgia and moved his family to Atlanta after his appointment to the bench, and that if a special election for the office of Associate Justice were to be called, he intends to run as a candidate.

state; nevertheless, it is not a sufficiently compelling reason to deny plaintiffs the relief they seek. The restoration of the plaintiffs' right to vote outweighs the public expenditure involved.

An injunction against Justice Gregory's further service on the court pending the special election, however, presents different concerns. It is clear that the public interest would best be served by the continuation of Justice Gregory on the court during the period prior to the special election. There was substantial testimony at trial as to the detrimental effects on the judicial system and the court's workload when a hiatus occurs between the departure of a justice and the swearing-in of his successor. The entire community has an interest in the stable and orderly administration of justice.

The Governor is constitutionally empowered to fill vacancies on the court and to administer the oath of office. Although the Governor violated the plaintiffs' constitutional right to vote by appointing and swearing-in Justice Gregory to succeed Justice Bowles, the Governor's actions vested Justice Gregory with de facto authority to act as an Associate Justice both prior and subsequent to this judgment. *See, e.g., Paige v. Gray*, 399 F. Supp. 459, 466-67 (M.D. Ga. 1975), *vacated on other grounds*, 538 F.2d 1108 (5th Cir. 1976); *Tarpley v. Carr*, 204 Ga. 721, 51 S.E.2d 638 (1949). Thus, although a vacancy on the court occurred which should have been filled by a special election, Justice Gregory is vested with the authority to continue on the court pending the outcome of the election. Therefore, Justice Gregory need not vacate the seat until the special election is concluded, and unless the results of the election so require. We do not believe that the appropriate remedy for vindication of the injury suffered

by plaintiffs includes an injunction against the interim tenure of defendant Gregory.

Plaintiffs also request, however, an injunction against Justice Gregory's inclusion on the ballot as the incumbent. Plaintiffs presented expert testimony at trial to support the generally-held belief that incumbency is an advantage in an election. *See, e.g., Clough v. Guzzi*, 416 F. Supp. 1057 (D. Mass. 1976). Had defendants held a special election after November 20, 1980 as they were required to do by law, defendant Gregory would not have run as an incumbent. Permitting the justice to run as the incumbent candidate in the special election would affirm the Governor's unlawful exercise of his appointment power and unfairly tilt the election toward the Governor's chosen candidate. We will grant plaintiffs' request that defendant Gregory be enjoined from running as an incumbent in the special election.

B. **Damages**

Plaintiffs seek one dollar each as nominal compensation for the denial of the invaluable right to vote. They also seek one million dollars in punitive damages from defendants Busbee and Bowles to be paid into the state treasury to help finance the special election.

Plaintiffs have shown a constitutional violation that caused them injury, and that defendants knew or should have known that their actions would have that effect. They are therefore entitled to damages. Even when there is no proof of actual injury, the denial of a constitutional right is actionable for nominal damages. *See Carey v. Piphus*, 435 U.S. 247 (1978). For the abstract injury to plaintiff's constitutional rights, they are entitled to be awarded the one dollar each that they seek.

An award of punitive damages is a section 1983 action, however, is proper only if the state defendants acted in bad faith or from an improper motive. *See, e.g., Harris v. Harvey*, 605 F.2d 330 (7th Cir. 1979), *cert. denied*, 445 U.S. 938 (1980). Plaintiffs have not shown any malicious action or bad faith on the part of defendants, and are not entitled to punitive damages.

C. Costs and Attorney's Fees

Plaintiffs shall recover their costs and reasonable attorney's fees from the defendants for time spent in litigating this action. 42 U.S.C. § 1988. The parties are directed to attempt to resolve the matter of attorney's fees among themselves. Failing agreement, however, plaintiffs may, upon submission of appropriate affidavits, petition the court for resolution of the matter.

V. PENDANT STATE LAW CLAIM: FRAUD

Plaintiffs allege that defendants Busbee and Bowles committed acts of fraud by reinterpreting the meaning of the November 20, 1980 letter of resignation after plaintiffs demanded a special election, administering and taking the oath of office for Justice Bowles' new term on the Supreme Court, misrepresenting to the plaintiffs that the justice intended to serve his new term in office, and failing to disclose that Justice Bowles was going to resign from office on his first day in his chambers in the new court term. Plaintiffs contend that these fraudulent acts entitle them to injunctive relief and damages under state equitable and legal principles. Ga. Code §§ 37-702-704; 105-302.

Because we will grant plaintiffs relief on their constitutional claims, we need not reach the merits of plaintiffs'

state law claim. To the extent that plaintiffs seek vindictive and punitive damages, however, we find that plaintiffs also fail to establish this damage claim under state law.

Ga. Code § 105-2002 provides for exemplary or punitive damages in tort actions where the factfinder concludes that the circumstances of the fraud are sufficiently aggravating. Ga. Code § 105-2003 provides for vindictive damages where "the entire injury is to the peace, happiness, or feelings of the plaintiff. . . ." Plaintiffs have neither alleged nor proved an injury to their emotional or mental well-being that could even theoretically fall under section 105-2003. To be entitled to punitive damages under section 105-2002, plaintiffs would have to show that the defendants' alleged misrepresentations or omissions constituted "an intentional disregard of the rights of another, knowingly or wilfully disregarding such rights." *Ponce de Leon Condominiums v. DiGirolamo*, 238 Ga. 188, 232 S.E.2d 62 (1977). This standard is similar to that for awarding punitive damages under 42 U.S.C. § 1983, and such relief is not authorized by the evidence. Plaintiffs' state law claim will not support an award of punitive or vindictive damages.

In sum, the court hereby ORDERS

(1) That defendants are ENJOINED to take all necessary steps to hold a special election for Associate Justice of the Supreme Court of Georgia at the earliest possible date consistent with the requirements of state law, and defendants shall advise the court within twenty (20) days from the date of this order of a proposed timetable for holding the election;

(2) That defendant Hardy Gregory, Jr. is ENJOINED from running as an incumbent candidate in the special election;

(3) That plaintiffs are AWARDED $1.00 each in nominal damages for the denial of their constitutional rights to be paid by defendants; and

(4) That plaintiffs shall recover from defendants all reasonable attorney's fees and the costs of this action.

Accordingly, the court GRANTS IN PART plaintiffs' prayer for injunctive relief and damages as set forth in this order. The Clerk of the Court shall enter FINAL JUDGMENT in favor of plaintiffs in this action.

IT IS SO ORDERED.

This, the 28th day of April, 1981.

/s/ RICHARD C. FREEMAN
RICHARD C. FREEMAN
UNITED STATES DISTRICT JUDGE

PART V

DISTRICT COURT DENIAL OF MOTION TO DISMISS

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ELIZABETH B. DUNCAN, ET AL.
vs.
DAVID B. POYTHRESS, ET AL.

CIVIL ACTION NO. 81-199 A

March 10, 1981

ORDER

Plaintiffs in this civil rights action, 42 U.S.C. § 1983, allege that defendants deprived them of their constitutional rights under the Fourteenth Amendment of the United States Constitution, and also assert a pendant state claim of fraud. Ga. Code § 37-703. Plaintiffs seek injunctive and declaratory relief, and damages. The action is currently before the court on (1) plaintiffs' motion to amend their complaint, Rule 15, Fed. R. Civ. P., and (2) defendant's motion to dismiss the complaint for failure to state a claim upon which relief can be granted, Rule 12(b)(6), Fed. R. Civ. P.

Under Rule 15, a party may amend its complaint "once as a matter of course at any time before a responsive pleading is served . . . ." Defendants have not yet answered, and plaintiffs may amend their complaint as a matter of course without the permission of the court. We will treat defendants' motion to dismiss as addressed to the amended complaint.

Plaintiffs' complaint states the following facts. Plaintiffs are registered voters in Fulton County and DeKalb

County, Georgia. Defendants are David B. Poythress, Secretary of the State of Georgia, Jesse G. Bowles, retired Associate Justice of the Supreme Court of Georgia, George Busbee, Governor of Georgia, and Hardy Gregory, Jr. Associate Justice of the Supreme Court of Georgia. On November 4, 1980, Justice Bowles, then serving on the court, was reelected to a new six-year term to begin January 1, 1981. Plaintiffs contend that defendant Bowles resigned effective December 31, 1980 from the office of Justice of the Supreme Court of Georgia by a letter sent to Governor Busbee dated November 20, 1980. Complaint, Exhibit A. The resignation was accepted by Governor Busbee by letter dated November 21, 1980. *Id.* at Exhibit C. Justice Bowles did not resign, however, but instead took the oath of office on December 15, 1980, for his new term beginning in January 1981. After serving one working day in office, he resigned on January 5, 1981. Governor Busbee then appointed defendant Gregory to fill Justice Bowles' six-year term on the court. As a result of defendants' actions, plaintiffs contend they were denied the right to vote in a special election for a new justice.

The state constitution of Georgia provides for the election of state Supreme Court justices. If a vacancy occurs during an unexpired term, however, the Governor appoints a successor.

> The Justices . . . shall hold their offices for six years, and until their successors are qualified. They shall be elected by the people at the same time and the same manner as members of the General Assembly. In case of any vacancy which causes an unexpired term, the same shall be filled by executive appointment, and the person appointed by the Governor shall hold his office until the next regular election, and until his successor for the balance of the unexpired term shall have been elected and qualified. The returns of such elections shall

> be made to the Secretary of State, who shall certify the result to the Governor, and commission shall issue accordingly.

Ga. Code § 2-3103. There is also a state statute which provides that whenever the person elected to an office fails validly to take office, or withdraws before taking office, the vacancy is to be filled by a special election.

> Whenever any primary or election shall fail to fill a particular nomination or office and such failure cannot be cured by a run-off primary or election, or whenever any person elected to public office shall die or withdraw prior to taking office, or whenever any person elected to public office shall fail validly to take that office, then the authority, with whom the candidates for such nomination or office filed their notice of candidacy, shall thereupon call a special primary or election to fill such position.

Ga. Code § 34-1514. Due to Bowles' resignation before he took office, plaintiffs contend, defendant Poythress was and is required under the law to call a special election to fill Bowles' new term. In three counts alleging fraud and violations of their rights under the due process and equal protection clauses, plaintiffs claim that the defendants manipulated the events to avoid holding a special election in order to allow Justice Bowles' office to be filled by executive appointment.

Defendants contend that plaintiffs fail to state a claim under either federal or state law. They argue that plaintiffs' due process and equal protection rights have not been violated because there is no recognized constitutional right to vote for state judges. *See Holley v. Askew*, 583 F.2d 728 (5th Cir. 1978). In addition, to the extent that any constitutional right to vote for members of the Supreme Court of Georgia may exist, it is qualified by

the section in the Georgia Constitution providing that in the event a vacancy on the court occurs during an unexpired term, the Governor shall appoint a successor. *See* Ga. Code § 2-3103. Plaintiffs' claim of fraud also fails, defendants argue, because plaintiffs do not allege the misrepresentation of a material fact by defendants or their reliance on that misrepresentation as required by state law. Ga. Code § 37-703.

Because the jurisdiction of this court is predicated on plaintiffs' claims under the United States Constitution, we will turn first to those issues.

I. CONSTITUTIONAL CLAIMS

The Constitution of the United States protects the right of all qualified citizens to vote in state as well as in federal elections. *E.g., Reynolds v. Sims*, 377 U.S. 533 (1964). Although the regulation of state elections is wholly within the authority of the state, the procedures chosen by the state are subject to constitutional guarantees. *See, e.g., Oregon v. Mitchell*, 400 U.S. 112 (1970). The states may not, for example, unlawfully restrict the franchise, or violate the one-man, one-vote rule. *See, e.g., Baker v. Carr*, 369 U.S. 186 (1962).

Defendants are correct when they argue that there is no constitutionally guaranteed right to vote for state judges. *Holley v. Askew*, 583 F.2d at 730. If the state of Georgia had never provided for the election of state judges, or had repealed the current statutory and constitutional provisions and replaced them with a different system for choosing or appointing judges, plaintiffs' constitutional claims would probably be dismissed. *See, e.g., Holshouser v. Scott*, 335 F. Supp. 928 (M.D.N.C. 1971), *aff'd*, 409 U.S. 807 (1972). The manner of holding and regulating

elections is within the state's constitutional prerogative. Defendants misstate the nature of plaintiffs' complaint, however. Plaintiffs do not challenge the validity of the state laws, they challenge the manner in which they were implemented.

Although a state has broad discretion to choose a system for electing officials, that power is always subject to the First, Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments to the United States Constitution.

> [A]s a general rule, whenever a state or local government decides to select persons by popular election to perform government functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election. . . .

Hadley v. Junior College District of Metropolitan Kansas City, Missouri, 397 U.S. 50, 56 (1970). Thus, plaintiffs contend that once the state provides for the election of judges, state officials cannot arbitrarily take away the voters' right to exercise their franchise.

Unlike most of the voting cases, however, plaintiffs do not contend that there is a prevailing unconstitutional malapportionment, or that they are members of a class of persons who are being discriminated against. *See Avery v. Midland County, Texas*, 390 U.S. 474 (1968). Nevertheless, plaintiffs do claim that defendants' actions unlawfully denied them access to the ballot altogether. A failure to conduct a local or state election may amount to a denial of the constitutionally-protected right to vote. *See Hackett v. President of City Council of City of Philadelphia*, 298 F. Supp. 1021 (E.D. Pa.), *aff'd*, 410 F.2d 761 (3d Cir. 1969). *See also Jackson v. Ogilvie*, 426 F.2d 1333 (7th Cir.), *cert. denied*, 400 U.S. 833 (1970) (constitu-

tional provision for special elections to fill vacancy in U. S. House of Representatives mandatory). We believe that plaintiff's complaint advances constitutional issues appropriate for resolution by this court.

II. FRAUD

Georgia law provides that

> Misrepresentation of a material fact, made wilfully to deceive, or recklessly without knowledge, and acted on by the opposite party, or if made by mistake and innocently, and acted on by the opposite party, constitutes legal fraud.

Ga. Code § 37-703. Defendants contend that plaintiffs have not alleged the misrepresentation of any material fact by defendants, and that plaintiffs have not asserted that they acted or relied on any representation made to them. These two omissions render plaintiffs' complaint defective as a matter of law. *See, e.g., Blackmon v. Scoven*, 231 Ga. 307, 201 S.E.2d 474 (1973).

Plaintiffs' complaint alleges that defendants Busbee and Bowles made two material misrepresentations to the public and to plaintiffs. First, they misrepresented the intended effective date of Justice Bowles' November 1980 resignation in order to create a vacancy on the court that could be filled by appointment rather than by special election. Second, by Busbee's administering the oath of office of Bowles and Bowles taking the oath, the defendants misrepresented to the public and to plaintiffs that Justice Bowles intended to serve out his new term. In addition, plaintiffs wrote to Secretary Poythress in December 1980 to inquire whether a special election would be held. The Secretary responded that Justice Bowles intended to enter on his new term in 1981. Complaint at Exhibits G, H. Plaintiffs contend that as a result

of these alleged misrepresentations and to the detriment of their right to vote, they "stilled their demands for a special election" until after the Justice resigned in January 1981. Amended Complaint at ¶ 20.

For the purposes of a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, the complaint is construed in the light most favorable to the plaintiff and its allegations are taken as true. *See* 5 C. Wright and A. Miller, *Federal Practice and Procedure: Civil* § 1357 (1969). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41 (1957). Motions to dismiss for failure to state a claim are disfavored by the courts.

It is clear that under this liberal standard, plaintiffs' claim of fraud more than adequately meets Rule 12(b)(6) requirements. Plaintiffs set forth factual allegations of material misrepresentations and reliance with sufficient particularity to state a valid claim against defendants under Georgia law and to permit a responsive pleading. Plaintiffs may puruse [*sic*] their claim for relief in this court.

The service by a defendant of a motion under Rule 12 enlarges the time for filing a response to the complaint to ten days after the court disposes of the motion "unless a different time is fixed by the court." Rule 12(a), Fed. R. Civ. P. Considering the acceleration of the trial in this case, we will permit defendants six (6) days from the date of this order to file their answer to the complaint. *See, e.g., Drinan v. Nixon*, 364 F. Supp. 853 (D. Mass.), *aff'd*, 502 F.2d 1158 (1st Cir. 1973).

Accordingly, defendants' motion to dismiss the complaint is DENIED. Plaintiffs' motion to amend the complaint is GRANTED. Defendants are ALLOWED six (6) days from the date of this order to answer the complaint.

IT IS SO ORDERED.

This, the 10th day of March, 1981.

/s/ RICHARD C. FREEMAN

RICHARD C. FREEMAN
UNITED STATES DISTRICT JUDGE

Joint Appendix

Supreme Court, U.S.
FILED
APR 5 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1055

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DAVID B. POYTHRESS, *et al.*,
Petitioners,

v.

ELIZABETH B. DUNCAN,
ELIZABETH N. STOUT and
KATHLEEN KESSLER,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, UNIT B, NOW THE ELEVENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED
DECEMBER 4, 1981
CERTIORARI GRANTED FEBRUARY 22, 1982

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*This item was reproduced in the Appendix to the Petition for Certiorari. Pursuant to Rule 30.1, this item is not reproduced here. The reference "C.A. ____" is to the Appendix to the Petition for Certiorari and to the pages therein where the item is found.

RELEVANT DOCKET ENTRIES

In the United States District Court for the Northern District of Georgia Atlanta Division Docket Number C81-199A

Date*	Proceeding
January 30	Complaint
February 9	Motion for preliminary injunction
February 18	Motion to dismiss
February 26	Order consolidating trial on merits and preliminary injunction hearing
February 27	Motion to expedite discovery by plaintiff
March 4	Order granting motion to expedite discovery
March 5	Brief in opposition to motion to dismiss
March 5	Motion to amend complaint
March 10	Order denying motion to dismiss, granting motion to amend complaint
March 13	Defenses and answer
March 30	Second motion to amend complaint
April 1	Order granting second motion to amend complaint
April 1	Hearing on preliminary injunction and trial on the merits
April 2	Hearing on preliminary injunction and trial on the merits
April 2	Motion for dismissal
April 2	Order denying motion for dismissal
April 28	Order enjoining defendants to hold a special election; enjoining Hardy Gregory, Jr., from running as an incumbent, and awarding plaintiffs one dollar each in nominal damages

*All relevant docket entries occurred in 1981, unless otherwise noted.

In the United States District Court for the Northern District of Georgia Atlanta Division

Docket Number C81-199A

Date*	Proceeding
April 28	Judgment entered
April 29	Notice of appeal by defendants
April 29	Motion to suspend order pending appeal
April 29	Order denying motion to suspend order pending appeal
May 7	Order from Court of Appeals that motion of defendants for stay pending appeal is granted, pending further consideration
May 14	Order from Court of Appeals that motion of defendants for stay pending appeal is granted

In the United States Court of Appeals for the Fifth Circuit, Unit B, now the Eleventh Circuit

Docket Number 81-7363

Date*	Proceeding
April 29	Motion for stay pending appeal and motion for expedited appeal
April 30	Order granting motion for stay pending appeal, pending further consideration
May 8	Brief in opposition to appellants' motion for stay pending appeal
May 12	Order granting motion for stay and for expedited appeal

*All relevant docket entries occurred in 1981, unless otherwise noted.

In the United States Court of Appeals for the Fifth Circuit, Unit B, nov. the Eleventh Circuit
Docket Number 81-7363

Date*	Proceeding
September 29	Opinion affirming decision of the District Court
October 9	Petition for rehearing and suggestion for rehearing en banc
November 18	Order denying rehearing
November 20	Petition for stay of mandate
November 25	Brief in opposition to appellants' motion for stay of mandate
December 12	Order granting stay of mandate
December 17	Notice of filing petition for certiorari on December 4, 1981
February 26, 1982	Notice of granting of certiorari on February 22, 1982

*All relevant docket entries occurred in 1981, unless otherwise noted.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Filed in Clerk's Office
U.S.D.C.—Atlanta
JAN 30 1981
BEN H. CARTER, Clerk
By: /s/ P. PARKS, Deputy Clerk

ELIZABETH B. DUNCAN and
ELIZABETH N. STOUT,
Plaintiffs

vs.

DAVID B. POYTHRESS, as Secretary of State, State of Georgia, GEORGE D. BUSBEE, individually and as Governor of the State of Georgia, JESSE G. BOWLES, and HARDY GREGORY, JR., as Associate Justice, Supreme Court of Georgia,
Defendants

CASE NO.
C81-199A

COMPLAINT

I.
INTRODUCTION

Plaintiffs' Complaint is filed to assert their rights as citizens of the United States and the State of Georgia, to cast their ballots and select an individual for the position of associate justice of the Supreme Court of Georgia. Plaintiffs were and have been deprived of this right by the fraud and illegal scheme of the Defendants, the Honorable GEORGE D. BUSBEE, and JESSE G. BOWLES. Plaintiffs seek a declaration of their rights, equitable relief, money damages, and any other relief available to them under the laws of the Constitution of the State of

Georgia and the United States to insure and protect their elective franchise.

II.

PARTIES

1.

Plaintiff, ELIZABETH B. DUNCAN, is a citizen of the United States, a resident of Fulton County, Georgia, and a registered voter qualified currently and since before November 4, 1980, to vote in state wide elections in the State of Georgia.

2.

Plaintiff, ELIZABETH N. STOUT, is a citizen of the United States, a resident of DeKalb County, Georgia, and a registered voter, qualified currently and since before November 4, 1980, to vote in state wide elections in the State of Georgia.

3.

Both Plaintiffs voted in the November 4, 1980, election, in which Defendant BOWLES ran as unopposed incumbent for the six (6) year term of office of Associate Justice, Georgia Supreme Court.

4.

Defendant, DAVID B. POYTHRESS, is Secretary of State for the State of Georgia, and may be served at the State Capitol, Room 214, Atlanta, Georgia, 30334.

5.

Defendant POYTHRESS is subject to the jurisdiction of this Court.

6.

Defendant, GEORGE D. BUSBEE, is the Governor of the State of Georgia, a resident of Fulton County, Georgia, and may be served at 391 West Paces Ferry Road, N.W., Atlanta, Georgia.

7.

Defendant BUSBEE is subject to the jurisdiction of this Court.

8.

Defendant, JESSE G. BOWLES, is a resident of the State of Georgia, and may be served at 201 Court, Cuthbert, Georgia, 31740.

9.

Defendant BOWLES is subject to the jurisdiction of this Court.

10.

Defendant, HARDY GREGORY, JR., is an Associate Justice of the Supreme Court of Georgia, and may be served at the State Judicial Building, Room 541, Atlanta, Georgia, 30334.

11.

Defendant GREGORY is subject to the jurisdiction of this Court.

III.

JURISDICTION

1.

This action arises under 42 U.S.C. §1983, the Fourteenth Amendment of the Constitution of the United States, and Ga. Code Ann. §105-301 and §37-701 et.seq., and 28 U.S.C. §§2201 et.seq.

2.

The parties and subject matter of this action are subject to the jurisdiction of this Court conferred by the foregoing statutes and by 28 U.S.C. §1343(3). Plaintiffs specifically invoke jurisdiction in this United States District Court for violation of civil rights guaranteed them by the laws and Constitution of the United States.

3.

The Secretary of State, Governor of Georgia and the Attorney General for Georgia received notice as required by Georgia Code §3-116 prior to the time set for proceedings in this action.

IV.

FACTS

1.

In the General Election on November 4, 1980, incumbent of the Supreme Court Associate Justice JESSE G. BOWLES was elected to a new six (6) year term beginning January 1, 1981, to succeed himself in the term he was then serving, which expired December 31, 1980.

2.

By letter dated November 20, 1980, Defendant

BOWLES resigned "with deep regret," his office as Associate Justice of the Supreme Court of Georgia, stating that his resignation was effective December 31, 1980. See Plaintiffs' Exhibit "A", attached to this Petition and incorporated herein.

3.

In a statement released by Supreme Court Administrator CHARLES WEBB, BOWLES said he was resigning to join his son in private law practice in Cuthbert, Georgia. See Plaintiffs' Exhibit "B", attached to this Petition and incorporated herein.

4.

On November 20, 1980, Defendant BUSBEE notified A. G. CLEVELAND, Chairman of the Judicial Nominating Commission, to begin the process of selecting nominees for a vacancy soon to be created by Defendant BOWLES' departure from the Supreme Court.

5.

On November 21, 1980, Defendant BUSBEE accepted the resignation of Defendant BOWLES from the Georgia Supreme Court. See Plaintiffs' Exhibit "C", attached and incorporated herein.

6.

At a press conference on December 4, 1980, Defendant BUSBEE stated that he did not favor a special election to select an individual for the Georgia Supreme Court vacancy created by BOWLES' resignation, and that he planned to appoint a successor to BOWLES. See Plaintiffs' Exhibit "D" attached and incorporated herein.

7.

At some time between November 20, 1980, and December 5, 1980, Defendants BUSBEE and BOWLES realized that if BOWLES did not enter upon the duties of his new term starting January 1, 1981, then Defendant BUSBEE could not legally appoint a successor to BOWLES' office on the Supreme Court for the term beginning January 1, 1981.

8.

Common Cause/Georgia Chairperson by letter of December 3, 1980, to Defendant POYTHRESS made a formal request for a special election to fill the vacancy created by Defendant BOWLES' resignation. See Plaintiffs' Exhibit "E", attached and incorporated herein.

9.

The revised plan to manipulate events for Busbee to appoint a Supreme Court Justice is detailed by the Governor's lawyer, CHARLES TIDWELL, in a letter to DAVID POYTHRESS dated December 5, 1980. See Plaintiffs Exhibit "F", attached and incorporated herein.

10.

Since a December 31, 1980, resignation by BOWLES would require Defendant POYTHRESS to call a special election, BOWLES' resignation, (effective December 31, 1980), is now characterized by TIDWELL as applying only to BOWLES' old term, which *automatically* expired December 31, 1980. See Plaintiffs' Exhibit "F", attached and incorporated herein.

11.

TIDWELL says Defendant BOWLES *will take the oath*

on December 15, 1980, for his new term of office which starts January 1, 1981.

12.

Then TIDWELL explains why the Judicial Nominating Commission has been continuously processing candidates for gubernatorial appointment since November 20, 1980, for BOWLES' office THAT IS NOT EMPTY: because BOWLES MIGHT resign "sometime" after he assumes his newly elected office on January 1, 1981.

13.

While the elected candidate (Defendant Bowles) stated he intended to serve the new term, the Judicial Nominating Commission continued the exhaustive procedure of notifying and processing candidates for Bowles' office, pursuant to Defendant Busbee's instructions.

14.

In a formal request first made on December 3, 1980, and renewed on December 9, 1980, Common Cause/Georgia Chairperson KATHLEEN KESSLER requested the date of the special election to fill the Supreme Court position to be vacated by the resignation of Associate Justice JESSE G. BOWLES, December 31, 1980. See Plaintiffs' Exhibit "G", attached and incorporated herein.

15.

On December 15, 1980, in response to the aforesaid demand for a special election, Defendant POYTHRESS would not set a date for a special election, stating that "special election . . . is not required or permitted by Georgia Law, "because Justice BOWLES" does intend to enter upon the duties of a new term of office beginning on

January 1, 1981." See Plaintiffs' Exhibit "H", attached and incorporated herein.

16.

On December 15, 1980, Defendant BOWLES took the oath of office as Associate Justice of the Supreme Court of Georgia, saying that he "solemnly swears that he will discharge all the duties lawfully required of him as Associate Justice of the Supreme Court of Georgia." See Plaintiffs' Exhibit "I", attached and incorporated herein.

17.

At no time since November 20, 1980, did Defendant BUSBEE halt the Judicial Nominating Commission's search for nominees to fill the position of Defendant BOWLES even while Defendants BOWLES and BUSBEE were making statements that BOWLES intended to serve his term beginning January 1, 1981.

18.

On or about December 16, 1980, Defendant BUSBEE received the list of nominees to the position for which the Defendant BOWLES had just sworn to serve, from A. G. CLEVELAND, Chairman of the Judicial Nominating Commission.

19.

On January 5, 1981, after serving one working day of a six-year term, Defendant BOWLES resigned as Associate Justice of the Georgia Supreme Court; his resignation was accepted the same day by Defendant BUSBEE. See Plaintiffs' Exhibit "J" and "K", attached and incorporated herein.

20.

On January 8, 1981, Defendant BUSBEE appointed Defendant GREGORY to fill the position of Associate Justice of the Georgia Supreme Court, vacated by Defendant BOWLES, with the term expiring December 31, 1986.

21.

On January 9, 1981, Plaintiffs again requested Defendant POYTHRESS to call a special election for Associate Justice "[s]ince no person has qualified to serve in this office, except as a result of a series of fraudulent acts," but has not yet received an answer from Defendant POYTHRESS. See Plaintiffs' Exhibit "L", attached and incorporated herein.

V.

COUNT ONE: FRAUD

1.

Plaintiffs reassert and reallege the events set forth in Paragraphs 1 through 20, under Part IV, FACTS, of this Petition.

2.

The actions of Defendant BOWLES show that he knew before December 15, 1980, when he took his oath of office, that he never intended to serve the term to which he was elected on November 4, 1980.

3.

Further, the actions of Defendant BOWLES show that he intended to be in office in 1981, not to serve the citizens of Georgia, but to cheat citizens of Georgia of their elective

franchise to vote in office Justices of the Georgia Supreme Court.

4.

Defendant BOWLES served one working day of his term, so that he could arrange events to allow Defendant BUSBEE to appoint his successor.

5.

The actions of Defendant BOWLES show he did not intend on December 15, 1980, to "discharge all the duties lawfully required of him as Associate Justice of the Supreme Court of Georgia" and to uphold the Constitution of Georgia.

6.

Instead, Defendant BOWLES' first official act was to abandon the duties of Associate Justice and to help the Governor to defeat a constitutional requirement for election of Supreme Court Justices.

7.

Since Defendant BOWLES took the oath of office fraudulently, the oath taking is void *ab initio*, and this Court should so declare.

8.

The actions of Defendant BUSBEE show that Defendant BUSBEE knew before BOWLES was sworn in December 15, 1980, that BOWLES would "serve" in his new term only to set up appointive power for Defendant BUSBEE.

9.

The appointment power exercised by Defendant BUS-

BEE is the fruit of his own fraudulent behavior, and should be declared void by this Court.

10.

During the period of events described in this Petition, both Defendant BUSBEE and Defendant BOWLES were under an obligation, by oath, as elected officers of this State to uphold the Constitution of Georgia.

11.

Defendant BUSBEE has intentionally and fraudulently breached his duty to the citizens of Georgia by his actions taken to insure his illegal appointive power of Georgia Supreme Court Justice.

12.

Defendant BOWLES has intentionally and fraudulently breached his duty to Plaintiffs and the citizens of Georgia by taking an oath of office for which he was elected, but which he never intended to serve except to further the fraudulent and illegal scheme with Defendant BUSBEE to usurp the elective franchise from citizens.

13.

In reliance on the statements of Defendants BUSBEE and BOWLES that BOWLES would serve in his new term, Defendant POYTHRESS refused to call a special election.

14.

This series of illegal and fraudulent manueverings by Defendants BUSBEE and BOWLES deprived Plaintiffs DUNCAN and STOUT and all registered voters in Georgia of the constitutionally guaranteed elective fran-

chise to vote for a person who intended to serve as Justice of the Supreme Court of Georgia. Georgia Code §2-3103; Amendment 14, United States Constitution.

VI.

COUNT TWO:

§1983 DUE PROCESS VIOLATIONS

1.

Plaintiffs reassert and reallege the events set forth in Paragraphs 1 through 20, under Part IV, FACTS, of this Petition.

2.

The right to vote is a liberty well protected by the Fourteenth Amendment to the United States Constitution.

3.

Defendants BUSBEE and BOWLES, while doing the events described in this Petition, were acting under color of State law and under oath to uphold the Georgia and United States Constitutions.

4.

Defendants BUSBEE and BOWLES' intentional acts described in this Petition illegally and fraudulently, and without due process of law, deprived Plaintiffs and all voters in Georgia of their constitutionally guaranteed right to vote for Justices of the Georgia Supreme Court.

VII.

COUNT THREE

§1983 EQUAL PROTECTION VIOLATIONS

1.

Plaintiffs reassert and reallege the events set forth in Paragraphs 1 through 20, under Part IV, FACTS, of this Petition.

2.

The Georgia Constitution states that *all* registered voters in Georgia will elect Justices to the Georgia Supreme Court. Ga. Code §2-3103.

3.

Only one person—Defendant BUSBEE—was allowed to cast his vote for Justice for the term abandoned by Defendant BOWLES.

4.

There is no legal or rational justification for setting apart GEORGE BUSBEE in a superior class of one who retains his right to vote, while he deprives Plaintiffs and all other Georgia voters of their right to vote.

5.

Defendants BUSBEE and BOWLES have mutually cooperated to deny to Plaintiffs and all other registered voters equal protection of the laws in the election of Supreme Court Justices.

VIII.

REMEDIES

SPECIAL ELECTION

1.

Plaintiffs have no remedies at law for the denial of the elective franchise in the selection of Supreme Court Justice of Georgia.

2.

Plaintiffs and all registered voters in Georgia were irreparably harmed and will continue to be harmed by the actions of Defendants which denied Plaintiffs and all Georgia voters the constitutional right to vote for a Georgia Supreme Court Justice who will serve, unless and until this Court orders a special election for this office.

3.

It is the duty of Defendant POYTHRESS to call special elections as required by the Constitution and statutes of Georgia. Georgia Code §34-1514; §34-301; §34-1002; §34-1006.

4.

Since Defendant BOWLES has only fraudulently, not legally, taken the oath for Justice of the Georgia Supreme Court, there is a void *ab initio* in this office which must be filled by a special election called by Defendant DAVID B. POYTHRESS.

5.

Plaintiffs have made a demand for a special election which to date has not been granted by Defendant POYTHRESS.

WHEREFORE, Plaintiffs pray this Court to restore open elections of Supreme Court Justices in Georgia by ordering:

(1) that summons and process issue and be served on all Defendants unless Defendants acknowledge service;

(2) That a preliminary and permanent injunction issue ordering:

(a) that Defendant DAVID B. POYTHRESS, as Secretary of State for the State of Georgia, be ordered to set a date for the special election of a Supreme Court Justice to fill the term starting January 1, 1981;

(b) that Secretary of State DAVID B. POYTHRESS be enjoined from placing the word "incumbent" on the special election ballot to describe Defendant GREGORY, should Defendant GREGORY run for this office;

(c) that Defendant HARDY GREGORY, JR., be enjoined from further serving the term on the Georgia Supreme Court abandoned by Defendant BOWLES;

(d) that Defendant GREGORY be enjoined from campaigning and running as "incumbent" for the office he now serves as Associate Justice of the Georgia Supreme Court;

(e) that Defendant BUSBEE be enjoined from appointing a person to the Georgia Supreme Court to succeed Defendant BOWLES;

(3) That a declaratory judgment issue stating:

(a) that Defendant BOWLES served until January 5, 1981, of his new term merely to further the plans of Defendants BUSBEE and BOWLES to defeat the elective franchise of Plaintiffs and other voters in Georgia;

(b) that all of Defendant BUSBEE'S actions to defeat

the elective franchise for Plaintiffs and all Georgia voters are ultra vires, unconstitutional and therefore, void;

(d) that Defendant BUSBEE had no power to appoint Defendant GREGORY to succeed BOWLES;

(4) that Defendants BUSBEE and BOWLES be assessed all court costs and attorneys' fees (pursuant to 42 U.S.C. §1988) in this litigation AS INDIVIDUALS, the cost not to fall upon the taxpayers of Georgia;

(5) that Defendants BUSBEE and BOWLES be ordered to pay Plaintiffs in exemplary damages $1,000,000 to discourage future frauds and tamperings with the democratic process by these Defendants and all others, this amount to be held by Plaintiffs in escrow, then paid to the budget of the Secretary of State to finance the special election for Supreme Court Justice, and, thereby, to pay back to the citizens of Georgia the extra expenses of the State due to Defendants BUSBEE'S and BOWLES' fraud.

(6) such other and further relief that to this Court seems just and proper to restore the elective franchise to Plaintiffs and all voters in Georgia.

ATTORNEYS FOR PLAINTIFFS

/s/ KATHLEEN KESSLER
KATHLEEN KESSLER
4064 Chippewa Place, NE
Atlanta, Georgia 30319
(404) 457-8354

/s/ WILLIAM F. RUCKER
WILLIAM F. RUCKER
129 Church Street
P.O. Box 147
Decatur, Georgia 30031
(404) 373-3331

Please address all correspondence to William B. Hollberg.

WILLIAM B. HOLLBERG
1750 Peachtree Street, NW
Suite 275
Atlanta, Georgia 30309
(404) 874-9777

GEORGIA:

FULTON COUNTY:

VERIFICATION

Personally appeared before the undersigned attesting officer, duly qualified to administer oaths, Elizabeth B. Duncan and Elizabeth N. Stout, Plaintiffs in the within matter, who swore that the facts and allegations contained in the within Complaint are true and correct to the best of their information and belief.

This the 30th day of January, 1981.

Sworn to and subscribed
before me this the 30
day of January, 1981.

/s/ SARA N. EDWARDS
Notary Public

/s/ ELIZABETH B. DUNCAN
Elizabeth B. Duncan

Notary Public, Georgia, State at Large
My Commission Expires April 19, 1983

Sworn to and subscribed
before me this the 30
day of January, 1981.

/s/ WILLIAM F. RUCKER
Notary Public

/s/ ELIZABETH N. STOUT
Elizabeth N. Stout

Notary Public, Georgia, State at Large
My Commission Expires Oct. 19, 1982

SUPREME COURT OF GEORGIA
STATE JUDICIAL BUILDING
ATLANTA, GEORGIA 30334

JESSE G. BOWLES
ASSOCIATE JUSTICE

November 20, 1980

Honorable George Busbee
Governor, State of Georgia
Atlanta, Georgia

Dear Governor Busbee,

It is with deep regret I find I must resign my Commission as Associate Justice of the Supreme Court of Georgia, effective December 31, 1980.

My service on the court has been rewarding and my faith in the judicial system remains strong. Your cooperation with the judicial branch of government has been exemplary.

My best wishes to you and the standards of good government for which you stand.

Sincerely yours
Jesse G. Bowles

PLAINTIFFS' EXHIBIT A

The Atlanta Journal WEEKEND The Atlanta Constitution November 22, 1980

14-A...

Just-Elected Justice Quits State Bench

By Fran Besser
Constitution Staff Writer

Georgia Supreme Court Justice Jesse G. Bowles, who was elected to a new six-year term on Nov. 4, announced Friday that he will resign from the state's highest court on Dec. 31. State officials were unsure how a successor to fill his six-year term would be picked.

Bowles, 66, notified Gov. George Busbee of his resignation Thursday in a handwritten letter, just 15 days after he was re-elected to the court. The governor was out of town and had not formally accepted the resignation late Friday.

Busbee appointed Bowles to the high court four years ago to replace former Justice William Gunter.

In a statement released by the Supreme Court, Bowles said he was resigning to join his son, Jesse G. Bowles III, in private law practice in Cuthbert.

The pending vacancy left state elections officials and attorneys at the state Capitol hurriedly searching law books to see how Bowles' replacement would be chosen. Since Bowles announced he would resign at the end of his present term, on Dec. 31, he will apparently not be sworn into office on Jan. 1 for the new term.

The state Constitution says that in the event of "any vacancy which occurs on unexpired term" on the Supreme Court, the governor shall appoint a successor until the next general election, which would be in 1982.

But, a section of the Georgia Code says that "whenever any person elected to public office shall die or withdraw prior to taking office . . . then the authority with whom the candidate for such nomination or office filed their notice of candidacy (the secretary of state) shall thereupon call a special primary or election to fill such a position."

Deputy Legislative Counsel Harvey Findley said he thought the state code would take precedence over the Constitution in this instance since Bowles is resigning prior to taking office. But Findley predicted the matter would end up in the lap of Attorney General Arthur Bolton.

State Elections Supervisor Frances Duncan hurriedly started sifting through law books after hearing of Bowles resignation. She admitted bafflement at the process of filling Bowles' impending vacancy. Mrs. Duncan said a special primary and special general election would cost approximately $1.5 million.

Bowles had been a trial lawyer in southwest Georgia for over 30 years before taking a seat on the Supreme Court in 1971.

PLAINTIFFS' EXHIBIT B

25

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Office of the Governor

Atlanta, Georgia 30334

George Busbee
GOVERNOR

November 21, 1980

Honorable Jesse G. Bowles
Associate Justice
Supreme Court of Georgia
State Judicial Building
Atlanta, Georgia 30334

Dear Justice Bowles:

This will acknowledge receipt of your letter of November 20 in which you tender your resignation as an Associate Justice of the Supreme Court of Georgia effective December 31, 1980. As requested, I hereby accept your resignation effective on said date.

Let me take this opportunity to acknowledge and thank you for your public service to the citizens of this State. Your contributions as a member of the judiciary have been exemplary, and I extend to you my very best wishes for the future.

With kindest personal regards, I am

Sincerely,

George Busbee

GBrctl

PLAINTIFFS' EXHIBIT C

D

Busbee will appoint judge replacement

By TOM CRAWFORD
Staff Writer

Gov. George Busbee appears headed for a showdown with Common Cause over the filling of a vacancy on the Georgia Supreme Court.

Officials of the citizens lobby have asked the Georgia secretary of state's office to call a special statewide election to replace Supreme Court Justice Jesse Bowles, who resigned in November shortly after being re-elected to a new six-year term.

Meanwhile, 47 names have been submitted to fill the Supreme Court vacancy, as well as a Court of Appeals vacancy created when Judge George T. Smith ran successfully for the Supreme Court.

Busbee said Thursday he does not support the idea of a special election to choose a successor to Bowles and plans to appoint his replacement.

"I think I am acting in the best interests of the state," Busbee said at his weekly press conference.

The governor said a special election would cost $1 million and would attract only a 6 percent to 8 percent voter turnout.

He denied published reports that he had held a private meeting prior to the Nov. 4 general election to persuade Bowles to hold off on his retirement announcement so that a successor could be appointed rather than elected.

"There's absolutely no truth, no foundation (to the report)," Busbee said. "It's just really hogwash."

See BUSBEE, 4C

The Atlanta Journal
Section C
. . Friday, December 5, 1980

Busbee Continued from 1C

The final decision on calling a special election would depend on the timing of Bowles' resignation, said a spokesman for Secretary of State David Poythress.

"The way we interpret the law, it seems to be clear we call a special election if the judge does not take the office to which he's elected," said the spokesman, Kelly McCook. "His term expires Dec. 31 and his letter of resignation says he (Bowles) resigns Dec. 31."

If Bowles took the oath of office for the new term beginning Jan. 1, then stepped down as justice, Busbee could legally appoint a successor, McCook said.

Bowles' secretary referred a reporter's questions to Charles Tidwell, legal counsel to Busbee. Tidwell said he "fully expects" Bowles to take the oath of office for a new term in January and then resign.

Common Cause Chairman Kathleen Kozier said an election was requested to "get back into practice the constitutional requirement of public election of all judges."

She noted that each of the current members of the Supreme Court and Court of Appeals were initially appointed by a governor to fill an unexpired term.

Among those on the list of 47 names submitted to the state Judicial Nominating Commission are several prominent figures, including Atlanta City Council President Marvin Arrington, U.S. Attorney William Harper and former U.S. Rep. Charles Weltner. The list includes 29 blacks.

Commission Chairman A.O. Cleveland Jr. said the commission plans to cut the list to five qualified nominees for each position before submitting it to Busbee.

In other business Thursday, Busbee said he will not appoint a successor to Bibb County District Attorney Dan Thompson, who was shot and killed while trying to stop a burglary of a friend's apartment in Macon last weekend.

A special election is being held in Bibb Jan. 27 to replace Thompson, and Busbee said he will let Interim District Attorney Charles Weston serve until then.

The governor has authorized a reward of $10,000 for information leading to the arrest and conviction of the persons who killed Thompson.

PLAINTIFFS' EXHIBIT D, P. 1 of 2.

The Atlanta Journal

Covers Dixie like the dew

Thursday evening, December 4, 1980

Busbee adamant about picking judge

By TOM CRAWFORD
Journal Staff Writer

Gov. George Busbee appears headed for a showdown with Common Cause over the filling of a vacancy on the Georgia Supreme Court.

Common Cause officials have asked the secretary of state's office to call a special statewide election to replace Supreme Court Justice Jesse Bowles, who resigned in November shortly after being re-elected to a new six-year term.

Busbee said Thursday he does not support the idea of a special election and plans to appoint a successor to Bowles.

"I think I am acting in the best interests of the state," Busbee said at his weekly press conference.

The governor said a special election would cost $1 million and would attract only a 6 percent to 8 percent voter turnout.

He denied published reports that he had held a private meeting prior to the Nov. 4 general election to persuade Bowles to hold off on his retirement announcement so that a successor could be appointed rather than elected.

"There's absolutely no truth, no foundation (to the report)," Busbee said. "It's just totally baseless."

The final decision on calling a special election would depend on the timing of Bowles' resignation, said a spokesman for Secretary of State David Poythress.

"The way we interpret the law, it seems to be clear we call a special election if the judge does not take the office to which he's elected," said the spokesman, Sidney McCook. "His term expires on Dec. 31 and his letter of resignation says he (Bowles) resigns Dec. 31."

If Bowles took the oath of office for the new term beginning Jan. 1, then stepped down as justice, Busbee could appoint a successor, McCook said.

Common Cause Chairman Kathleen Kessler said an election was requested to "put back into practice the constitutional requirement of public election of all judges."

She noted that each of the current members of the Supreme Court and Court of Ap-

See VACANCY, 12A

Vacancy

Continued from 1A

peals were initially appointed by a governor to fill an unexpired term.

In other business, Busbee said he will not appoint a successor to Bibb County District Attorney Dan Thompson, who was shot and killed while trying to stop a burglary of a friend's apartment.

A special election is being held in Bibb Jan. 27 to replace Thompson, and Busbee said he will let Interim District Attorney Charles Watson serve until then.

The governor has authorized a reward of $10,000 for information leading to the arrest and conviction of the person who killed Thompson.

Busbee said he also did his part this week to keep University of Georgia football Coach Vince Dooley from taking a similar post at Auburn University.

"I did all I could through mutual friends to persuade him to stay at Georgia," Busbee said. He said he did not speak directly to either Dooley or University President Fred Davison.

PAINTING, MARK D., p. 2 of 2.

Common Cause/Georgia
403 W. Ponce de Leon
Suite 117
Decatur, Georgia 30030

Hon. David Poythress
Secretary of State
State of Georgia
State Capitol
Atlanta, Georgia 30334

Dear Mr. Poythress:

Please notify us of the special election for the empty seat on the Georgia Supreme Court.

Thank you.

Sincerely,

Kathleen Kessler
Chair, Common Cause/Georgia

cc: George Busbee, Governor
Arthur Bolton, Attorney General

PLAINTIFFS' EXHIBIT E

Office of the Governor

Atlanta, Georgia 30334

George Busbee
GOVERNOR

Charles Kidd
EXECUTIVE COUNSEL

December 5, 1980

Honorable David B. Poythress
Secretary of State
State Capitol
Atlanta, Georgia 30334

Dear Mr. Poythress:

Attached you will find a copy of Justice Bowles' letter of November 20, 1980, to the Governor resigning his presently held commission as an Associate Justice of the Supreme Court. Such resignation is to become effective upon the last day of his present term of office which is December 31, 1980. Also attached is a copy of the Governor's letter of acceptance of such resignation effective on December 31, 1980.

No where within Justice Bowles' letter is there any mention, reference or allusion as to what action Justice Bowles intends to take in reference to the term of office as an Associate Justice of the Supreme Court to which he was elected in the November 1980 general election. It is my understanding that any future action in reference to such term of office, if any, will be initiated by the Justice in writing and directed to the Governor. Therefore, clearly none of the circumstances which are set forth within Code Section 34-1514 have occurred which would require the calling of a special election.

Justice Bowles is scheduled to be administered the oath of office by the Governor on the 15th of this month for his newly elected term, along with the other members of the appellate courts who were also elected to terms of office in the 1980 general election. Unless Justice Bowles should, by appropriate communication to the Governor, otherwise indicate, we expect Justice Bowles to enter upon the duties of his new term of office on January 1, 1981. While it is only private supposition upon my part at this time, I would not be surprised if sometime after Justice Bowles assumes his newly elected office on the first of January, he should resign. In anticipation of this eventuality, we have requested the Judicial Nomi-

DEC 8 12 24 PM '80
SECRETARY OF STATE
FILED

nating Commission to initiate their screening processes of candidates to fill by executive appointment any vacancy which might thus occur.

Sincerely,

Charles E. Tidwell

CET:yl

December 9, 1980

Hon. David Poythress
Secretary of State
State of Georgia
State Capitol
Atlanta, Georgia 30334

Dear Mr. Poythress:

In a letter delivered last Wednesday, I asked if you could tell us the date of the special election for the State Supreme Court position to be open when Justice Jesse Bowles finishes his term December 31, 1980. We have not received an answer from you, except indirectly through the newspapers.

Selby McCash was quoted as saying, "If Bowles took the oath of office for the new term beginning Jan. 1, then stepped down as justice, Busbee could legally appoint a successor." While this was only a few days ago, there seems to be some urgency about this matter, since some resolution of this matter should have occurred by January 1.

We know these facts:

1) There has been speculation on how a special election could be avoided, so that Governor Busbee, not the People of Georgia, would select a judge. Mr. Charles Tidwell, the Governor's lawyer, has speculated that Justice Bowles might want to be sworn in and serve all or part of his new term. "Who knows what he may decide to do about that new term," said Tidwell.

2) Justice Bowles submitted his resignation effective December 31, 1980. In an interview, Justice Bowles told us that he would not communicate except through official channels and thus refused to clarify if he will be sworn in to the new term and subsequently resign from it, so that the Governor can appoint his successor.

3) The Georgia Constitution requires election of State Supreme Court justices, when, as the evidence now indicates, there will be no one to serve the new term.

This situation cries out for resolution.

We feel that you are the proper person to resolve this issue:

WE ASK THAT YOU CONTACT JUSTICE BOWLES
AND CLARIFY WHETHER OR NOT HE WILL TAKE
THE OATH FOR A NEW TERM.

As time is running out, we will contact you on Monday, December 15, for your answer. If you are unavailable, will you appoint a person to speak for you? We will ask Mr. McCash who that person is, and receive the answer from that person.

Sincerely,

Kathleen Kessler
Chair, Common Cause/Georgia

cc: Gov. George Busbee
Justice Jesse Bowles
Atty. Gen. Arthur Bolton

PLAINTIFFS' EXHIBIT G

David B. Poythress
SECRETARY OF STATE

Secretary of State
State Capitol
Atlanta
30334

December 15, 1980

Ms. Kathleen Kessler
Chair, Common Cause/Georgia
403 W. Ponce de Leon
Suite 117
Decatur, Georgia 30030

Dear Ms. Kessler:

This is in response to your letters of December 3 and December 9, concerning the effect of the resignation submitted by Justice Bowles to the Governor on November 20, 1980.

By letter dated December 5, 1980, the Governor's Executive Counsel, Mr. Charles Tidwell, indicates that Justice Bowles' resignation, and the Governor's acceptance thereof, were intended by both men to relate to Justice Bowles' presently held commission which expires December 31, 1980. Justice Bowles has verbally confirmed to me that such was his intention and that he does intend to enter upon the duties of the new term of office beginning on January 1, 1981.

Under these circumstances, it appears that a special election to fill the term of office beginning on January 1, 1981, is not required or permitted by Georgia law.

Very truly yours,

David B. Poythress
Secretary of State

DBP:ga

cc: Governor George Busbee
Justice Jesse G. Bowles
Honorable Arthur K. Bolton

PLAINTIFFS' EXHIBIT H

804

OATH OF ASSOCIATE JUSTICE OF THE SUPREME COURT OF GEORGIA

STATE OF GEORGIA)
COUNTY OF FULTON)

I, ..., do solemnly swear that I will discharge all the duties lawfully required of me as Associate Justice of the Supreme Court of Georgia, according to the best of my ability and understanding.

I do further swear that I am not the holder of any public money due this State, unaccounted for; that I am not the holder of any office of trust under the Government of the United States, nor of either of the several states, nor of any foreign state, and that I am otherwise qualified to hold said office, according to the Constitution of the United States and of this State.

I do further swear that I will administer justice without respect to person, and do equal rights to the poor and the rich, and that I will faithfully and impartially discharge and perform all of the duties incumbent on me as Associate Justice of the Supreme Court of this State, according to the best of my ability and understanding, and agreeably to the laws and Constitution of this State, and the Constitution of the United States.

SO HELP ME GOD!

.....

Sworn to and subscribed before me

this ..... day of ....., 19.....

.....
Governor

PLAINTIFFS' EXHIBIT I

SUPREME COURT OF GEORGIA
STATE JUDICIAL BUILDING
ATLANTA, GEORGIA 30334

JESSE G. BOWLES
ASSOCIATE JUSTICE

Honorable George D. Busbee
Governor
State of Georgia
Atlanta - Georgia

Dear Gov. Busbee,

I hereby submit to you my resignation as a Justice of the Supreme Court of Georgia and the underlying Commission which would otherwise expire Dec 31, 1986. I request your immediate acceptance so that I can return to the active practice of law.

Sincerely yours
Jesse G. Bowles

Jan 5. 1981

PLAINTIFFS' EXHIBIT J

Office of the Governor

Atlanta, Georgia 30334

George Busbee
GOVERNOR

January 5, 1981

Honorable Jesse G. Bowles
Associate Justice
Supreme Court of Georgia
State Judicial Building
Atlanta, Georgia 30334

Dear Justice Bowles:

This will acknowledge receipt of your letter of January 5, 1981, in which you tender your resignation as a Justice of the Supreme Court of Georgia. As requested, I hereby accept your resignation effective this date.

With kindest regards and best wishes, I am

Sincerely,

George Busbee

GB:ctl

PLAINTIFFS' EXHIBIT K

9 January 1981

Hon. David B. Poythress
Secretary of State
State Capitol
Atlanta, Georgia 30334

Dear Mr. Poythress:

In letters to you of December 3 and December 9, Kathleen Kessler requested the date of the special election to be set by you to fill the term of office beginning on January 1, 1981, of a Georgia Supreme Court Justice. This, we thought, would be necessary since Justice Jesse Bowles, newly elected to this term, had submitted a letter of resignation "effective December 31, 1980," leaving a void to be filled by an election.

In your reply letter of December 15, 1980, to Ms. Kessler you stated:

> "By letter dated December 5, 1980, the Governor's Executive Counsel, Mr. Charles Tidwell, indicates that Justice Bowles' resignation, and the Governor's acceptance thereof, were intended by both men to relate to Justice Bowles' presently held commission which expires December 31, 1980. Justice Bowles has verbally confirmed to me that such was his intention and that he does intend to enter upon the duties of the new term of office beginning on January 1, 1981."

During the discussion of Justice Bowles' intentions at your office, we asked you if Justice Bowles had told you on the phone that he intended to enter upon the duties of his new term and serve that term. You replied "yes," he intended to serve.

Your letter concludes,

> "Under these circumstances, it appears that a special election to fill the term of office beginning on January 1, 1981, is not required or permitted by Georgia Law."

Since your reply letter, Justice Bowles did take the oath of office, but served only one working day in his new term and subsequently resigned. Further, Governor Busbee, who never halted the work of the Judicial Nominating Commission to find a nominee for the Supreme Court vacancy begun November 20, 1980, has appointed a replacement from the Commission's list of nominees.

From these facts it is clear to us that Jesse Bowles never did intend to serve in the new term starting January 1, 1981, that he took the oath for an office he never intended to serve (as he lead all of us to believe he would). Such action is a fraud upon the voters of Georgia, and his oath-taking should be declared void ab initio.

From these facts, it is also clear that Governor Busbee knew of Jesse Bowles' true intentions at least by November 20, 1980, when he activated the Judicial Nominating Commission, yet he participated in the fraud by covering up the true facts and arranging to appoint a successor to Justice Bowles.

Since no person has qualified to serve in this office, except as a result of a series of fraudulent acts, we ask you once again,

WHEN WILL YOU CALL A SPECIAL ELECTION FOR THE JANUARY 1, 1981 TERM OF JUSTICE OF THE GEORGIA SUPREME COURT ?

We request your answer as quickly as you possibly can, since we are now into the term of office without a person to legally serve.

Sincerely,

Elizabeth B. Duncan

Elizabeth B. Duncan

Elizabeth W. Stout

Elizabeth W. Stout

PLAINTIFFS' EXHIBIT L

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DUNCAN, et al.,
Plaintiffs
v.
POYTHRESS, et al.,
Defendants

CIVIL ACTION
NO. C81-199A

MOTION TO DISMIS

The defendants, David B. Poythress, as Secretary of State of the State of Georgia, George Busbee, individually and as Governor of the State of Georgia, Jesse G. Bowles, and Hardy Gregory, Jr., as Associate Justice of the Supreme Court of Georgia, move this Court pursuant to Fed.R.Civ.P. 12(b)(6) to dismiss the plaintiffs' complaint on the ground that the complaint fails to state a claim upon which this Court may grant relief.

ARTHUR K. BOLTON
Attorney General

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Executive Assistant Attorney General

/s/ DON A. LANGHAM
DON A. LANGHAM
First Assistant Attorney General

/s/ MICHAEL J. BOWERS
MICHAEL J. BOWERS
Senior Assistant Attorney General

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Filed in Clerk's Office
U.S.D.C.—Atlanta
MAR 5 1981
Ben H. Carter, Clerk
By: /s/ P. Parks, Deputy Clerk

ELIZABETH B. DUNCAN, ORDINARY CITIZEN, and ELIZABETH N. STOUT, ORDINARY CITIZEN,
Plaintiffs

v.

DAVID B. POYTHRESS, as Secretary of State for the State of Georgia; GEORGE D. BUSBEE, as Governor for the State of Georgia and INDIVIDUALLY; JESSE G. BOWLES; HARDY GREGORY, JR. as Associate Justice of the Georgia Supreme Court,
Defendants

Civil Action #C81-199A

PLAINTIFFS' MOTION TO AMEND COMPLAINT

Plaintiffs bring this motion to amend their Complaint, pursuant to Federal Rules of Civil Procedure, Rule 15. Plaintiffs pray this Court will allow these amendments, most of which are responses to Defendants' questions about the acts of misrepresentation by Defendants Busbee and Bowles raised in Defendants' Brief in Support of Motion to Dismiss.

Another change adds as exhibits the public information statements made by a representative of the Georgia Supreme Court already mentioned in Complaint, p. 4,

para.3. And Plaintiffs amend the prayer to require Defendants Busbee and Bowles, whose acts were *ultra vires*, to pay their own litigation costs, not the Georgia taxpayers.

Plaintiffs' amendments read as follows:

Plaintiffs amend paragraph 3, page 4 by substituting the following paragraph *in lieu* of the original:

3

In statements released November 21, 1980, by Law Assistant and Administrative Aide to the Chief Justice CHARLES WEBB, BOWLES said he was resigning to join his son in private law practice in Cuthbert, Georgia; and (then) Chief Justice Hiram K. Undercofler "said today that he regrets that Justice Jesse G. Bowles has decided to leave the Supreme Court of Georgia." See Plaintiffs' Exhibits M and N attached to this amendment to Complaint and incorporated herein.

Plaintiffs amend Part V, COUNT ONE: FRAUD, by adding the following paragraphs after paragraph 14, page 11:

15

Defendants Bowles announced to and through Defendant Poythress and Charles Tidwell (Governor's Executive Counsel) that the resignation he sent to the Governor dated November 20, 1980, DID NOT refer to the new term he had just won (a six-year term scheduled to begin January 1, 1981), but that it referred only to the term which would end December 31, 1980. See Plaintiffs' Exhibits F & H of Complaint, attached and incorporated herein.

16

Defendant Bowles stated verbally to Defendant Poythress that he will take the oath for and serve the new six-year term of Supreme Court Justice commencing January 1, 1981. See Plaintiffs' Exhibits H & L, attached to this Complaint and incorporated herein.

17

Bowles took the oath for a new six-year term as Georgia Supreme Court Justice on December 15, 1980, at which time he "solemnly" swore that he "will discharge all the duties lawfully required" of him.

18

Plaintiffs accepted these acts as truly and sincerely done because Plaintiffs' appeals to Bowles' logic and reason could not sway him from his position that these acts were truly and sincerely done.

19

Defendant Bowles refused to talk directly to Plaintiffs or Plaintiffs' lawyers, so that Plaintiffs were forced to communicate with him through Poythress, Tidwell and news media,

20

As a result of Plaintiffs' acceptance of Defendant Bowles' acts, Plaintiffs *stilled their demands for a special election* from December 15, 1980, when Bowles took the oath until January 9, 1981, when Plaintiffs again wrote a letter demanding a special election. This letter followed Bowles' resignation on January 5, 1981, after he served one working day of his new term. See Exhibits L & J of Complaint incorporated into this paragraph.

21

The Office of Secretary of State *stopped its activities of gathering and evaluating data* to determine if a special election should be held as a result of these three acts of misrepresentation by Defendant Bowles. Plaintiffs' Exhibits B & D (for gathering and evaluating), and Exhibit H (for stopping) attached to Complaint and incorporated into this paragraph.

22

Defendant Busbee made a public show of acceptance of Bowles' explanation of the November 20, 1980 resignation, that it referred only to the term which would expire December 31, 1980. Plaintiffs Exhibits F & H attached to Complaint and incorporated into this paragraph.

23

Defendant Busbee administered the oath of office to Bowles on December 15, 1980, as though he thought the man was swearing to serve the term to which he had just been elected.

24

Plaintiffs accept Defendant Busbee's belief in the "re-interpretation" of the November 20 resignation, and his subsequent administration of the oath to Bowles for a new term, since Plaintiffs believed everyone accepted the solemnity of oath taking.

25

Thus, from December 15, 1980—when the oath was administered—until January 9, 1981 (the day after Busbee appointed Bowles' replacement), Plaintiffs *stilled their demands for a special election.*

26

The office of Secretary of State *stopped its activities of gathering and evaluating data* to determine if a special election should be held as a result of these two acts of misrepresentation. Plaintiffs Exhibits B & D (for gathering and evaluating) and Exhibit H (for stopping) attached to Plaintiffs' Complaint and incorporated into this paragraph.

27

Therefore, Plaintiffs were deceived and acted on the misrepresentations of Busbee and Bowles. Plaintiffs Exhibit O, attached to this amendment and incorporated into this paragraph.

Plaintiffs amend paragraph 1, Part VI, Count Two, page 11 by substituting the following paragraph *in lieu* of the original:

1.

Plaintiffs reassert and reallege the events set forth in paragraphs 1 through 21, under Part IV, FACTS; and paragraphs 1 through 27, under Part V, FRAUD of this Complaint.

Plaintiffs amend paragraph 1, Part VII, Count Three, page 12 by substituting the following paragraph *in lieu* of the original:

1.

Plaintiffs reassert and reallege the events set forth in paragraphs 1 through 21, under Part IV, FACTS; and paragraphs 1 through 27, under Part V, FRAUD of this Complaint.

At the end of the prayer, Plaintiffs add:

(7) that, upon finding for Plaintiffs, Defendants Busbee and Bowles be ordered to refund a specific sum to the State and people of Georgia equal to all costs for the attorney general's time and expenses (including copying, mailing, etc.) for representing these two officials, whose acts asserted in this lawsuit are *ultra vires*, and not pursuant to their official positions.

This Motion to Amend Complaint is respectfully submitted,

ATTORNEYS FOR PLAINTIFFS

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/s/ KATHLEEN KESSLER
by: Kathleen Kessler

CHARLES E. WEBB
LAW ASSISTANT AND ADMINISTRATIVE AIDE
TO THE CHIEF JUSTICE

Supreme Court of Georgia

JUDICIAL BUILDING
ATLANTA 30334

SUITE 603
(404) 656-3430

November 21, 1980

BOWLES

Justice Jesse G. Bowles, a member of the Supreme Court of Georgia for nearly four years, has resigned to return to the private practice of law at Cuthbert.

In a hand written letter to Gov. George Busbee, Justice Bowles asked that his resignation be made effective as of Dec. 31.

"My service on the Court has been rewarding and my faith in the judicial system remains strong," Justice Bowles wrote Governor Busbee. "Your cooperation with the judicial branch of government has been exemplary.

"My best wishes to you and the standards of good government for which you stand."

Justice Bowles said he will join his son Jesse G. Bowles, III, who has been in private practice at Cuthbert for more than six years.

Justice Bowles was a noted trial attorney with a considerable practice he had built up over a 30-year period in many southwest Georgia counties when he was appointed effective April 24, 1977, by Governor Busbee to replace Justice William Gunter who had resigned to re-enter private law practice.

Justice Bowles was president of the Randolph County Federal Savings and Loan Association when he was appointed to the court. He had served for 13 Years as chairman of the

CHARLES E. WEBB
LAW ASSISTANT AND ADMINISTRATIVE AIDE
TO THE CHIEF JUSTICE

Supreme Court of Georgia

JUDICIAL BUILDING
ATLANTA 30334

SUITE 503
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Randolph County school board and held farming, timber and business interests.

Justice Bowles was born to Jesse Groover Bowles and Bart Swann Bowles on August 24, 1921, in Baconton, Georgia. He graduated from Mitchell County High School and attended preparatory school at Georgia Military College. He did his undergraduate work at the University of Georgia and was a member of Chi Phi Fraternity. He received his L.L.B. degree from Lumpkin Law School at the University in 1946, Cum Laude.

He served in the Infantry for a brief period during World War II between undergraduate school and law school.

He practiced law at Cuthbert for thirty-one years, except for two and one-half years when he was house counsel for Callaway Mills Company at LaGrange. He was named a fellow in American College of Trial Lawyers, City Attorney for Cuthbert and County Attorney for Randolph County. He served as president of the Pataula Circuit Bar Association and as a member of the Board of Governors of the State Bar of Georgia. He was a member of the Georgia State Board of Bar Examiners from 1970 to 1974.

A former Rotarian, Justice Bowles is a deacon of the First Baptist Church of Cuthbert. He has been active in the University of Georgia Law School Association and the University Alumni Society

CHARLES E. WEBB
LAW ASSISTANT AND ADMINISTRATIVE AIDE
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Supreme Court of Georgia

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Justice Bowles married the former Mary Ruth Florence of Wrens, Georgia in 1945. In addition to the son, they have a daughter, Mrs. Rickey (Elizabeth) Chastain of Athens. There are four grandchildren, Rebecca Martin Bowles, Elizabeth Curtis Bowles, Hoyt Edwin Chastain and Lucy Bowles Chastain.

§ § §

November 21, 1980

UNDERCOFLER

Chief Justice Hiram K. Undercofler said today that he regrets that Justice Jesse G. Bowles has decided to leave the Supreme Court of Georgia.

"Justice Bowles has been a dedicated and diligent member of the Court and has made many worthwhile contributions to the field of jurisprudence," Chief Justice Undercofler said.

"We wish him well on his return to the private practice of law."

§ § §

EXHIBIT N

45
8711

3 ACTS OF MISREPRESENTATION BY DEFENDANT BOWLES ⟶ WHICH LED TO ⟶ CHANGES IN ACTIONS OF PLAINTIFFS & POYTHRESS = FRAUD

EXHIBIT O, p. 1 of 2.

1. Re-interpretation of Resignation

Bowles announced to and through Defendant Poythress and Charles Tidwell (Governor's Executive Counsel) that everyone was mistaken in assuming that the resignation he sent to the Governor dated November 20, 1980, referred to the new term he had just won, a six-year term scheduled to begin on January 1, 1981. He said it referred only to the term which would end December 31, 1980. Plaintiffs' Exhibits F & H of Complaint.

2. Assertion of Intent re: New Term

48

Bowles stated verbally to Defendant Poythress that he will take the oath for and serve the new six-year term of Supreme Court Justice commencing January 1, 1981. Plaintiffs' Complaint, Exhibits H & L. Exhibit L refers back to the conversation held in person with Defendant Poythress when Exhibit H was handed to Plaintiffs. Plaintiffs' Complaint, para. 13, 15, 17.

3. Swears to Fulfil All Duties of New Six-Year Term

Bowles took the oath for a new six-year term as Georgia Supreme Court Justice on December 15, 1980, at which time he "solemnly" swore that he "will discharge all the duties lawfully required" of him. Plaintiffs' Complaint, p. 7 , para. 16.

Plaintiffs accepted these three acts as truly and sincerely done because Plaintiffs' appeals to Bowles' logic and reason could not sway him from his position, that these acts were truly and sincerely done. Defendant Bowles refused to talk directly to Plaintiffs or Plaintiffs' lawyers, so that Plaintiffs were forced to communicate with him through Poythress, Tidwell and news media. As a result of this acceptance, Plaintiffs stilled their demands for a special election from Dec. 15, 1980 when Defendant Bowles took the oath, until January 9, 1981, when a letter was written again demanding a special election.

This letter followed Bowles' resignation on January 5, 1981, after he had served one working day of his new term. Plaintiffs' Complaint, Exhibits L & J.

The Office of Secretary of State stopped its activities of gathering and evaluating data to determine if a special election should be held as a result of these three acts of misrepresentation.
See Exhibits B & D for gathering and evaluating; Exhibit H for stopping.

46
8711

2 ACTS OF MISREPRESENTATION BY DEFENDANT BUSBEE ——→ WHICH LED TO ——→ CHANGES IN ACTIONS OF PLAINTIFFS + POYTHRESS = FRAUD

1. Busbee Makes Public Show of Acceptance of Bowles' explanation of November 20, 1980 resignation. Plaintiffs' Complaint, Exhibits F & H.

2. Busbee Administers Oath of Office to Bowles on December 15, 1980, as though he thought the man was swearing to serve the term to which he had just been elected.

Plaintiffs accept Defendant Busbee's belief in the "re-interpretation" of the November 20 resignation, and his subsequent administration of the oath to Bowles for a new term, since Plaintiffs believed everyone accepted the solemnity of oath taking.

Thus, from December 15, 1980 - when the oath was administered - until January 9, 1981 (the day after Busbee appointed Bowles' replacement), Plaintiffs stilled their demands for a special election.

The Office of Secretary of State stopped its activities of gathering and evaluating data to determine if a special election should be held as a result of these two acts of misrepresentation.
See Exhibits B & D for gathering and evaluating; Exhibit H for stopping.

49

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

Filed in Clerk's Office
U.S.D.C.—Atlanta
MAR 30 1981
Ben H. Carter, Clerk
By: /s/ [Illegible], Deputy Clerk

ELIZABETH B. DUNCAN and ELIZABETH N. STOUT,
Plaintiffs

VS.

DAVID B. POYTHRESS, as Secretary of State for the State of Georgia GEORGE D. BUSBEE, as Governor for the State of Georgia and INDIVIDUALLY; JESSE G. BOWLES; HARDY GREGORY, JR. as Associate Justice of the Georgia Supreme Court
Defendants

CIVIL ACTION FILE NO. C81-199A

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter with copy of this Plaintiffs' Second Motion to Amend Complaint, Brief, Second Amendment, Verification & Order by hand delivery. This 30 day of March 1981

/s/ WILLIAM B. HOLLBERG/KK
Attorney for Plaintiffs

PLAINTIFFS' SECOND MOTION TO AMEND COMPLAINT

Come now the Defendants Elizabeth B. Duncan and Elizabeth N. Stout, and move the court pursuant to Rule 15(a) of the Federal Rules of Civil Procedure for leave to amend their Complaint in this action.

The first change Plaintiffs desire to make is to amend the Complaint to set forth an allegation of the value to them of the denial by Defendants of Plaintiffs' rights to cast a vote for the replacement of Defendant Bowles to the Georgia Supreme Court. Plaintiffs have alleged this right was denied them but they have not alleged its value and desire to do so at this time.

The second change Plaintiffs desire to make is the addition of another Plaintiff, Kathleen Kessler, who up until this point has served as one of the co-counsel in the matter. The Plaintiffs desire to add Ms. Kessler as an additional Plaintiff because Ms. Kessler was actively involved in the efforts to determine the correct procedure for the replacement of Justice Bowles on the Supreme Court and her involvement was well known to the Defendants, in particular Defendants Poythress and Bowles who remember her coming to their offices and the agent of Defendant Busbee, Charles E. Tidwell who also remembers visits by Ms. Kessler. Plaintiffs move for leave to amend being fully aware that the trial of the matter is scheduled for April 1, 1981 but show that because of the speed with which the matter has been prepared for trial, no pre-trial order was done and Plaintiffs further show that because of Ms. Kessler's active involvement and because that involvement was further outlined in the deposition of Plaintiff Duncan on March 18, 1981, the addition of Ms. Kessler should cause no surprise and should have no

harmful impact on Defendants' preparation for trial.

The addition of Ms. Kessler is important because Defendants have suggested the technicality that the fraud of Defendant Bowles must have been communicated to an individual who is also a Plaintiff. Neither of the present Plaintiffs personally communicated with Justice Bowles but Ms. Kessler did attempt to communicate with Defendant Bowles and was advised by him that he had nothing to say and that any further contact or communication directed to him regarding his resignation and replacement should be directed throught [*sic*] "official channels."

The position and efforts reflected by Plaintiffs in this matter are actually the culmination of the work of a larger group of citizens who were concerned with trying to determine the correct procedures which should be followed to replace Justice Bowles on the Georgia Supreme Court. The Plaintiffs are aware that the remedies which they seek, an open special election for Justice of the Supreme Court, will benefit not only them but all voters in Georgia and this would have made Plaintiffs' action suitable as a class action. However, Plaintiffs simply could not afford the costs of notifying the class and other costs attendant in class actions. If Plaintiffs' remedy, a special election, is granted, then all persons affected would actually receive the benefit.

Therefore, because Ms. Kessler was an active part of this group Plaintiffs show that their remedies should not be frustrated because of the technicality that neither of the present Plaintiffs had the opportunity to be rebuffed by Justice Bowles.

Further, because of Ms. Kessler's active involvement Plaintiffs believe that the presentation of Plaintiffs' case

can be done in a more expedited manner and can reduce the time required at trial to present Plaintiffs' case.

WHEREFORE, Plaintiffs have attached their amendment and brief in support thereof and respectfully request that it be granted.

This the 30th Day of March, 1981.

/s/ WILLIAM B. HOLLBERG/KK
WILLIAM B. HOLLBERG
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ELIZABETH B. DUNCAN and ELIZABETH N. STOUT *Plaintiffs* VS. DAVID B. POYTHRESS, as Secretary of State for the State of Georgia GEORGE D. BUSBEE, as Governor for the State of Georgia and INDIVIDUALLY; JESSE G. BOWLES: HARDY GREGORY, JR. as Associate Justice of the Georgia Supreme Court *Defendants*	CIVIL ACTION FILE NO. C81-199A

PLAINTIFFS' SECOND AMENDMENT TO COMPLAINT

Come now Elizabeth B. Duncan and Elizabeth N. Stout, Plaintiffs in the above matter and with leave of this court granted pursuant to Rule 15(a) of the Federal Rules of Civil Procedure and amend their Complaint filed in this matter as follows:

(1) Plaintiffs amend section VIII of their Complaint by adding to said section a new paragraph 6 as follows:

> "6. Plaintiffs show that the conduct of Defendants Busbee and Bowles denied them of their right to vote for a Georgia Supreme Court Justice to replace Defendant Bowles and the value of that vote to each Plaintiff is worth a minimum of $1.00 and Plaintiffs should be compensated therefore by Defendants."

(2) Plaintiffs amend the prayers to said Complaint by adding a new number 8 thereto as follows:

> "(8) With that Defendants Busbee and Bowles pay to each Plaintiff the sum of at least $1.00 as compen-

sation to Plaintiffs for the denial to them of their right to vote for a Georgia Supreme Court Justice to replace Defendant Bowles."

(3) That the style of Plaintiffs' action be amended to include the name Kathleen Kessler and that all references thereafter to Plaintiffs be construed to include Elizabeth B. Duncan, Elizabeth N. Stout and Kathleen Kessler.

(4) That section II of Plaintiffs' Complaint be amended by adding thereto a new paragraph denominated 2a. as follows:

"2a. Plaintiff, Kathleen Kessler is a citizen of the United States, a resident of DeKalb County, Georgia, and registered voter, qualified currently and since before November 4, 1980 to vote in statewide elections in the State of Georgia."

/s/ WILLIAM B. HOLLBERG/KK
William B. Hollberg
Attorney for Plaintiffs

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Atlanta, Georgia 30309

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Filed in Clerk's Office
U.S.D.C.—Atlanta
APR 1 1981
Bee H. Carter, Clerk
By: /s/ [Illegible], Deputy Clerk

DUNCAN, ET AL. *Plaintiffs* VS. POYTHRESS, ET AL. *Defendants*	CIVIL ACTION FILE NO. C81-199A

ORDER

Plaintiffs' Motion to Amend Complaint and brief in support thereof having been carefully read and considered, this Court grants this motion. IT IS SO ORDERED.

This 1st day of April, 1981.

/s/ RICHARD C. FREEMAN
RICHARD C. FREEMAN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

TRANSCRIPT OF TRIAL BEFORE THE
HONORABLE RICHARD C. FREEMAN,
UNITED STATES DISTRICT JUDGE
APRIL 1-2, 1981

TESTIMONY OF THE HONORABLE
GEORGE D. BUSBEE, GOVERNOR OF GEORGIA,
ON CROSS EXAMINATION

QUESTIONS BY COUNSEL FOR PLAINTIFFS,
WILLIAM B. HOLLBERG

[R. 106, line 9-R. 108, line 13]

Q Governor, is it not true that you gave a press conference on the fourth of December 1981?

A That is correct.

THE COURT: Did you say December 4, 1981?

MR. HOLLBERG: 1980.

THE WITNESS: I answered incorrectly, too, Your Honor.

Q (By Mr. Hollberg) Governor Busbee, I'm going to ask you some questions about that, and for that purpose I'm going to have you refer to a partial transcript of that for your convenience.

At that press conference, were you asked this question, and I quote, 'Governor, Common Cause is calling for a special election to fill the vacancy created by the resignation of Justice Bowles. I wonder if you will support a special election."

To that question, was your answer, "No"?

A That is correct.

Q The second question, "Why not, sir?" Was your answer to that question, "Well, to have a turnout as you have here of six or eight percent of the people and spend over a million dollars for a election to fill a vacancy like this, I think it is in the best interest where you don't have other elections to have a turnout that would be truly indicative of the wishes of the people, that we have the appointment made after the judicial nominating commission reviews the applicants and then let the unexpired term be served by that person."

Was that your answer to that question?

A Yes. If I might explain.

Q You have answered yes?

A I have.

THE COURT: You also have the right to explain.

THE WITNESS: All right. At this press conference that you refer to on December 4, 1980, this was stated by one of the Plaintiffs that is the date I have a regular press conference. That means that all the press, television, radio and newspaper people are there, and I am not there just to answer questions. I have given press statements and then I answer questions on many subjects, so this question came up. There had been a lot of publicity put out of Common Cause on this, so what they were asking me about is whether or not I would support a special election.

By the term support, I am not the person that calls a special election. That is done by the Secretary of State. Under the facts and law as I knew it, a special election

was not called for, but I gave a very honest answer, because we had just had an experience here in Fulton County where you had a State Court Judge that had died, I believe, or something. You had a vacancy. You had a special election. They had like three or four percent of the people that turned out to vote, and I thought this is a better method provided in the law, and I so stated it.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

TRANSCRIPT OF TRIAL BEFORE THE
HONORABLE RICHARD C. FREEMAN
UNITED STATES DISTRICT JUDGE
APRIL 1-2, 1981

DEFENDANTS' MOTION FOR DISMISSAL
PRESENTED BY COUNSEL FOR
DEFENDANTS, MICHAEL J. BOWERS

[R. 287, lines 9-14]

MR. BOWERS: *** Your Honor, at this time, on behalf of the Defendants, I respectfully move this Court, pursuant to Rule 41b of the Federal Rules of Civil procedure for a[n] [in]voluntary [*sic*] dismissal on the grounds that Plaintiffs' upon the facts and upon the law have not shown any right to relief. ***

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

TRANSCRIPT OF TRIAL BEFORE THE
HONORABLE RICHARD C. FREEMAN,
UNITED STATES DISTRICT JUDGE
APRIL 1-2, 1981

COURT'S DENIAL OF DEFENDANTS'
MOTION FOR DISMISSAL

[R. 301, lines 19-21]

[By the Court]: *** I will deny your motion for dismissal under Rule 41.

Opposition

Office-Supreme Court, U.S.
FILED
DEC 28 1981
ALEXANDER L. STEVAS,
CLERK

NO. 81-1055

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

David B. Poythress, et. al.
Petitioners,

v.

Elizabeth B. Duncan, Ordinary Citizen, et. al.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, UNIT B, NOW THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

William B. Hollberg
1750 Peachtree Street, NW
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Atlanta, Georgia 30309

William F. Rucker
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55 Marietta Street
Atlanta, Georgia 30303

ATTORNEYS FOR RESPONDENTS

PLEASE ADDRESS ALL
COMMUNICATIONS TO:
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Suite 375
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(404) 873-5777

QUESTIONS PRESENTED

Respondents take issue with the Questions Presented by Petitioners in that they introduce distortions.

Below are Respondents' counter questions:

I. A. Did the following activities by state officials which resulted in the failure to hold an election violate the rights of Respondents under the First and Fourteenth Amendments to the U.S. Constitution and Section 1983 of the Civil Rights Act, 42 U.S.C. §1983?

Certain public officials of the State of Georgia inartfully arranged the timing of a resignation of a member of the Georgia Supreme Court so that the resignation became effective prior

to that Justice taking office for a new term to which he had just been elected. All of these officials expected the Governor of Georgia would appoint the replacement to the bench. Upon learning of the Georgia law which required, under these circumstances, that the replacement be selected by the voters in a special election, these officials arranged for the Justice to take the oath of office for the new term, work for four hours on the first working day of the term and then resign again. The Governor then appointed the replacement.

I. B. Should federal courts require federal constitutional issues to be litigated in state courts before a federal forum is available to the aggrieved party?

The following is Respondents' counter question if the writ is granted:

II. Should federal courts abstain when the state law question is clear and "simply means what it says," Duncan v. Poythress, 657 F.2d 695, 699 (5th Cir. 1981) (Petitioners' Appendix, p. 14a), especially where "fundamental constitutional rights enjoyed by a broad class of citizens would be suspended while adjudication begins in state court?" (Petitioners' Appendix, p. 15a).

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SHOW THAT THE RIGHT TO VOTE IS NOT PROTECTED BY THE FOURTEENTH AMENDMENT; THIS ARGUMENT MUST ULTIMATELY FAIL, AND IT IS IRONIC THAT PETITONERS ADMITTED IN THEIR PLEADINGS THAT "THE RIGHT TO VOTE IS A LIBERTY WELL PROTECTED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION." 26

B. THERE IS NO DECISION OF THIS COURT, INCLUDING SNOWDEN, WHICH IS INCONSISTENT WITH THE HOLDING OF THE COURT OF APPEALS: THAT THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT PROHIBITS THE DISENFRANCHISEMENT OF AN ENTIRE STATE'S ELECTORATE BY FAILURE TO HOLD A STATE ELECTION 28

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Powell v. Power, 436 F.2d 84 (2d Cir. 1970) 45

Reynolds v. Sims, 377 U.S. 533 (1964) 25

Snowden v. Hughes, 321 U.S. 1 (1944) ..... passim

Wesberry v. Sanders, 376 U.S. 1 (1964) 25

Williams v. Rhodes, 393 U.S. 23 (1969) 25

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, First Amendment ..... passim

United States Constitution, Fourteenth Amendment ..... passim

Constitution of the State of Georgia of 1976 (Ga. Code Ann. Section 2-3103) 4

42 U.S.C. Section 1982 ..... passim

Ga. Code Section 34-1514 4

NO. 81-1055

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

DAVID B. FOYTHRESS, as Secretary of State, State of Georgia; GEORGE D. BUSBEE, Individually and as Governor of the State of Georgia; JESSE G. BOWLES, Individually; and HARDY GREGORY, JR. as Associate Justice of the Supreme Court of Georgia,

Petitioners,

V.

ELIZABETH B. DUNCAN, ELIZABETH N. STOUT and KATHLEEN KESSLER, Ordinary Citizens,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, UNIT B, NOW THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, Elizabeth B. Duncan, Elizabeth N. Stout and Kathleen Kessler, Ordinary Citizens, respectfully ask for a speedy review and denial of writ of certiorari, so that the district judge's order may be carried out and a special election ordered as soon as possible to prevent the total erosion of Respondents' right to vote, for which Respondents have battled over a year.

OPINIONS BELOW

All prior written opinions have been included by Petitoners in the Appendix to their Petition. Respondents will refer to these opinions by reference to their location in Petitioners' Appendix.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the Fourteenth Amendment of the United States Constitution and 42 U.S.C. §1983, cited by Petitioners, Respondents include:

(1) First Amendment of the United States Constitution:

> "Congress shall make no law . . . abridging the freedom of speech, or the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

(2) Georgia Code Ann. §34-1514 (Acts 1970, pp. 347, 382):

> "Whenever any primary or election shall fail to fill a particular nomination or office and such failure cannot be cured by a primary or run-off election, or whenever any person elected to public office shall die or withdraw prior to taking office, then the authority, with whom the candidates for such nomination or office filed their notice of candidacy, shall thereupon call a special primary or election to fill such position."

STATEMENT OF THE CASE

Much of what Petitioners have said in their Statement of the Case is either wrong or misleading. An accurate and comprehensive statement of the facts was made in the Order issued by Judge Freeman, the trial judge, Petitioners' Appendix, p. 51a - 61a,

and Respondents incorporate that statement herein. The Court of Appeals was in such total agreement with Judge Freeman that it incorporated his Findings of Fact as an Appendix to its Opinion, Petitioners' Appendix, p. 38a - 45a.

Respondents will address the erroneous statements of Petitioners in the Introduction to Respondents' reasons why the writ should not be granted.

REASONS FOR DENYING THE WRIT

INTRODUCTION:

A CONCEPTUAL ERROR CAUSES THE PETITIONERS TO FAIL TO ACKNOWLEDGE THAT AT ISSUE IN THIS WRIT IS THEIR OWN CONDUCT WHICH CAUSED "A FUNDAMENTAL BREAKDOWN OF THE DEMOCRATIC SYSTEM." (PETITONERS' APPENDIX, p. 28a). PETITIONERS, THEREFORE, ARE LED TO RELY ON AUTHORITIES WHICH ARE INAPPOSITE AND THUS TO CREATE CONFLICTS WHICH THEY ARTFULLY URGE ON THIS COURT.

A. THE CONCEPTUAL ERROR.

The Petitioners have committed a gross conceptual error in their entire

approach to Respondents' claims. They have misstated the thrust of the claims from the trial court to this court. Petitioners apparently realize that their only hope is to make it appear that what is at issue here is a situation that is similar to "voting rights" cases everywhere. What they obsfucate is the truth which is that Respondents' claim is based on circumstances so rare and unusual that such a claim has never before been litigated (to Respondents' knowledge) and Respondents hope will never again be litigated.

The Court of Appeals saw the distinction clearly when it stated:

> "The Georgia voters are not asking the federal courts to count ballots or otherwise 'enter into the details of administration of (an) election.' 570 F.2d at 1078. Their request is far simpler and more basic: THEY ASK FOR THE ELECTION ITSELF, as required by state law. 657 F.2d at 705. (emphasis supplied).

Simply stated, the Petitioners' conceptual error is in forcing the issues of this action into the mold of those problems associated with elections once the election is called and the administration process of the election procedures is under way. How very different the administration of something which exists is from the decision to create something in the first place. Petitioners complain only

that an election which the law requires was never called because Governor Busbee wanted to use his power to appoint - - even as here - - where he had no such power.

The reason Petitioners' arguments are superficially believable and attractive is that it is so hard to believe what they really did. Yes, they failed to call AN ENTIRE ELECTION! This is not a simple instance of discrimination against a particular class of voters, this is not an oversight which resulted in incorrect ballot printing or counting. What we have here is a most unique instance of NO ELECTION AT ALL.

Petitioners would have this court believe, however, that all that is at issue in this action is another routine election administration problem which some malcontents claim deprived them of the right to vote. In truth, we have a circumstance which is unique in terms of the democratic form of government. We have an event which cries out for the fastest, most comprehensive emergency relief available.

The following two diagrams will help demonstrate the conceptual error of the Petitioners, and will help show how a failure to distinguish between these concepts will lead one to confuse authorities and provide a mask for allegations of conflicts among authorities.

THE ENTITY,
AN ELECTION

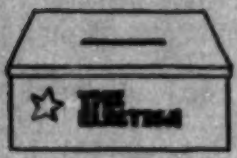

DIAGRAM "A"

DETAILS OF
ADMINISTRATION

DIAGRAM "B"

THE ENTIRE PETITION FOR A WRIT OF CERTIORARI HANGS ON THE PERPETUATION OF THIS CONCEPTUAL MUDDLE. Only if "this very different case of a fundamental breakdown of the democratic system" (Appendix, p. 28a) can be reinterpreted as merely another detail of the administration of an election can Petitioners successfuly paint their pictures of catastrophic scenes of "irreconcilable conflicts" (with Snowden v. Hughes, 321 U.S.1 (1944),

and with other cases among the circuits). It also allows Petitioners to misapply Parratt v. Taylor, ____ U.S. ____ 101 S. Ct. 1908 (1981) and the "dual nature of habeas corpus practice" to the issues raised in this action.

B. HOW THIS CONCEPTUAL ERROR CAUSES PETITIONERS TO MISTATE THE QUESTIONS PRESENTED.

In its summary holding the Trial Court said:

> "(t)he presumption that the office would be filled by appointment and the desire to exercise the Governor's prerogative overrode the statutory obligation to call a special election, and resulted in an infringement of the plaintiffs' right to vote." (Petitioners' Appendix, pp. 76a - 77a).

In arguing the Questions Presented by their Petition, Petitioners phrase their first question (I.A.) in terms of "Whether the appointment" supports a §1983 action. This is a subtle, yet critical twist of emphasis. Both the Trial Court and the Court of Appeals found that it was the REFUSAL TO CALL A SPECIAL ELECTION which gave rise to the §1983 action. If Petitioners can focus on the "appointment" aspect of what Petitioners did then they can try to shift the attention of the Court from a Diagram "A" analysis of the structure of the democratic system to a Diagram "B" problem of the details of the administration of an election.

In Petitioners' second question (I.B.) they continue to emphasize the procedural aspects of how Respondents can obtain relief, thus attempting to perpetuate the conceptual confusion of shoving this Diagram "A" problem into the penumbra of Diagram "B". Petitioners would have this Court believe that a mere procedural remedy aimed at the administration of the details of an election can give Respondents full, timely emergency relief. Petitioners can only assert this because they continue to fail to deal with the true nature of Respondents' action.

C. HOW THIS CONCEPTUAL ERROR CAUSES PETITIONERS TO DISTORT FACTS.

Petitioners suggest in their petition that Respondents made no allegations that Petitioners' conduct had any constitutionally discriminatory intent. One need look no further than Respondents' complaint to find such allegations.

On page 5 of their Statement, Petitioners would have this Court believe that Secretary of State Poythress conducted a straightforward investigation which allowed only one result - no special election. Petitioners gloss over the bizarre, even laughable, explanations received by Secretary of State Poythress, which demonstrate that his decision not to

call a special election was ridiculous. Secretary of State Poythress received a letter dated December 5, 1980 from Charles Tidwell, Executive Counsel to Governor Busbee, a copy of which is attached hereto in Respondents' Appendix as Exhibit "A". Tidwell stated to Secretary of State Poythress:

> "No where within Justice Bowles' letter (of resignation, Respondents' Appendix, Exhibit "B") is there any mention, reference or allusion as to what action Justice Bowles intends to take in reference to the term of office as an Associate Justice of the Supreme Court to which he was elected in the November 1980 General Election."

Secretary of State Poythress then telephoned Justice Bowles regarding this letter and these events and then

answered one of the Respondent's request for clarification as follows:

> ". . . Tidwell, indicates that Justice Bowles' resignation, and the Governor's acceptance thereof, were intended by both men to relate to Justice Bowles' presently held commission which expires December 31, 1980. Justice Bowles has verbally confirmed to me that such was his intention and that he does intend to enter upon the duties of the new term of office beginning on January 1, 1981." (from a letter dated December 15, 1980, a copy of which is attached hereto in Respondents' Appendix, Exhibit "C".)

What these intelligent men, all attorneys, are talking about is this; Justice Bowles resigned on November 20, 1980, (sixteen days after the general election in which he was elected to a new term). Governor Busbee accepted this resignation on November 21, 1980, with words of highest praise and farewell, a copy of said letter marked

Exhibit "D" is attached hereto in Respondents' Appendix. But then they claim he only intended to resign from the term which would expire on December 31, 1980 anyway, and that he would continue to serve on the Georgia Supreme Court in the new term to which he was JUST elected, commencing January 1, 1981.

The Petitioners have buffed the gloss over these facts to a high shine. How can they so boldly ask this Court to become accomplice to this madness? Not stopping with this they even assert that Justice Bowles told Secretary of State Poythress that he would enter "into" the duties of the new term, though Secretary of State Poythress has stated that Justice

Bowles told him that he intended to enter "upon" the duties. How subtle, how misleading!

Further, Petitioners claim on page 6 that Respondents' pendent state claim and the equal protection claim were denied and not appealed. Judge Freeman denied neither, he simply found he could give Respondents relief without having to reach those claims. Petitioners' Appendix pp. 70a and 80a - 81a.

The Petitioners conclude their statement on page 6 with a claim that the Court of Appeals held that, ". . . the Due Process Clause of the Fourteenth Amendment protects the right to vote in State elections of State officials."

This is a correct statement of what the Petitioners wish the Court of Appeals said. However, this is not what the Court of Appeals said, and the forceful repetition of something which is not true will not make it true.

The Court of Appeals clearly went to the heart of the unusual and unique problem presented by Respondents' action when it held:

> "The United States Constitution protects against complete deprivation as well as invidious discrimination. It is fundamentally unfair and constitutionally impermissible for public officials to disenfranchise voters in violation of state law so that they may fill the seats of government through the power of appointment. We therefore hold that such action violates the due process guarantees of the fourteenth amendment." (Petitioners' Appendix, p. 27a).

Petitioners have artfully attempted to reinterpret Respondents' claim from one that seeks to protect the democratic structure of our government from the Petitioners themselves who caused "a fundamental breakdown of the democratic system" (Petitioners' Appendix, p. 28a), into one which involves the day to day administration of elections in Georgia, with consequent considerations for comity, federalism and states rights. Petitioners make this attempt in a cynical attempt to exploit the valid concerns of many members of this Court that the federal courts have overreached their proper role. Petitioners assume that by glossing over the facts and by misinterpreting

case authority, they can obtain a review by this Court which would postpone any final determination until after the 1982 General Election in Georgia, in which the appointee must run for election. This may moot the issues raised by Respondents, and would prevent Respondents from ever having a remedy for the violation of rights secured to them by the United States Constitution. Such a result must not occur.

D. NO JUDGE TO DATE HAS AGREED WITH PETITIONERS' CONCEPTUAL MUDDLE.

The history of the opinions below provides clear evidence of the lack of substance in the Petitioners' claims. Judge Freeman ruled against the Petitioners on both of their motions and on final judgment at the trial.

In addition, every member in active service on the present Eleventh Circuit has considered Petitioners' claims. A three judge panel completely affirmed the Trial Court, (Petitioners' Appendix, p. 1a), and the entire Circuit rejected Petitioners' suggestion for rehearing en banc, with not one Judge requesting that the Circuit Court be polled (Petitioners' Appendix, p. 46a).

Thus, thirteen different federal judges have had the opportunity to review Petitioners' claims, with the benefit of the full record before them. In five separate rulings, there has been not one word of dissent, not one glimmer of hope for any of their theories, and not even one vote for rehearing en banc.

With this pathetic record, the Petitioners come to this Court and urge that Respondents should be further delayed in the exercise of the MOST BASIC of constitutional rights. The election should have been called over a year ago. Each ticking second and each passing day cheapens the value of this precious right, and secures to the Petitioners whatever satisfaction they

may receive from the frustration and subversion of the laws and Constitutions of Georgia and the United States.

Respondents urge this Court not to become enamored with or seduced by the efforts of Petitioners to obscure the facts so that inapposite authorities seem applicable. Respondents pursue the vindication of rights which were violated by the most unique circumstances. The Court of Appeals tailor-made its opinion to fit these precise circumstances and no other.

I. THERE IS NO CONFLICT WITH DECISIONS OF THIS COURT

A. PETITIONERS' ENTIRE ARGUMENT IN THIS SECTION IS BASED ON THEIR ATTEMPT TO SHOW THAT THE RIGHT TO VOTE IS NOT PROTECTED BY THE FOURTEENTH AMENDMENT; THIS ARGUMENT MUST ULTIMATELY FAIL, AND IT IS IRONIC THAT PETITIONERS ADMITTED IN THEIR PLEADINGS THAT "THE RIGHT TO VOTE IS A LIBERTY WELL PROTECTED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION."

In Respondents' complaint, Section VI, Count Two, Paragraph 2 it is alleged as follows: "The right to vote is a liberty well protected by the Fourteenth Amendment to the United States Constitution." In the

responsive pleading entitled "Defenses and Answer" filed on behalf of all Petitioners it is stated in paragraph 38 thereof as follows: "The defendants admit the averments of paragraphs 2 and 3 of Part VI of the complaint."

Of course, the outright denial of the vote--whether in federal or state elections--is not tolerated by this Court as it is totally repugnant to the fourteenth amendment. Protecting this right is of prime importance to this and all courts. Reynolds v. Sims, 377 U.S. 533, 534 (1964); Wesberry v. Sanders, 376 U.S. 1, 17 (1964); Williams v. Rhodes, 393 U.S. 23, 43 (1969), Harlan concurrence.

B. THERE IS NO DECISION OF THIS COURT, INCLUDING SNOWDEN, WHICH IS INCONSISTENT WITH THE HOLDING OF THE COURT OF APPEALS: THAT THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT PROHIBITS THE DISENFRANCHISEMENT OF AN ENTIRE STATE'S ELECTORATE BY FAILURE TO HOLD A STATE ELECTION.

Petitioners begin their argument in this section with three misstatements of the Court of Appeals decision which must be addressed.

First, they make it sound like there was a simple disagreement among reasonable people over whether the provisions of the Georgia Constitution (authorizing appointment in certain instances), or the Georgia law (requiring a special election in the

event of a withdrawal) would be applied. (Petition, pp. 6-7). The truth of the matter is that the facts found by Judge Freeman, and totally affirmed by the Court of Appeals, fall squarely within the terms of the special election statute (Petitioners' Appendix, pp. 73a-77a). Further, Judge Freeman found that none of the Petitioners, were even aware of the suddenly crucial distinction between a "resignation" and a "withdrawal" either at the time of Justice Bowles' resignation, November 20, 1980, or at the time of their depositions in March 1981, a few weeks prior to the trial. (Petitioners' Appendix, p. 73a).

Second, Petitioners claim that the Court of Appeals held that it was the "appointment" which violated Respondents' rights. This is not so. The Court of Appeals held that the violation was the illegal disenfranchisement of voters so state officials could "fill the seats of government through the power of appointment." (Petitioners' Appendix, p. 27a).

Third, the Petitioners' assertion on page 7 that there was no finding "of malice or intent to disenfranchise" is ludicrous in view of the Court of Appeals finding that "the decision to dispense with a special election was deliberate." (Petitioners' Appendix, p. 26a).

After these misstatements, Petitioners proceed to invoke the authority of Snowden in an effort to avoid the conclusion that the fourteenth amendment does protect the right to vote.

In Snowden, after a primary election had been held, a candidate complained he was denied equal protection of the laws by a county board in the certification of his nomination to appear on the general election ballot.

Although the candidate alleged the board acted willfully and maliciously, this Court determined that the lack of allegations "tending to show a purposeful discrimination between persons or classes of persons is not

supplied by the opprobrious epithets 'willful' and 'malicious' ..." 321 U.S. at 10. Thus, the candidate's claim failed for lack of substantive allegations. Snowden cannot control to require the dismissal of Respondents' action, because there is no dispute among the parties about the deprivations complained of by Respondents, namely that Respondents have not had a special election in which they may exercise the right to vote.

Justice Douglas dissented in Snowden, but summarized the ruling, clearly identifying it as a Diagram B problem, as follows:

> "I also agree that a candidate for public office is not denied the equal protection of the law in the

> constitutional sense merely because he is the victim of unlawful administration of a state election law." 321 U.S. at 18.

Most of the many cases quoting Snowden cite it for the principle that a violation of state law, without more, will not provide the elements for a federal forum. Snowden is undeniably authority for this proposition: "Mere violation of a state statute does not infringe the federal Constitution." 321 U.S. at 11. Thus, cases controlled by Snowden involve only a state law violation. Snowden does not control the action brought by Respondents where an additional federal constitutional violation is demonstrated.

Petitioners misquote this short sentence, (Petition, p. 10) leaving off the word "mere," attempting to convey

the idea that violations of state statutes would never infringe upon the federal Constitution.

Courts, after the Snowden decision, now recognize that the rights of voters and candidates for State office are inextricably intertwined, and the constitutional protections formerly reserved for voters are now given candidates. E.g. Lubin v. Panish, 415 U.S. 709, 716 (1974); Bullock v. Carter, 405 U.S. 134 (1972). Thus, this Snowden language must be narrowly read within the case facts:

> " . . . an unlawful denial by state action of a right to state political office is not a denial of a right of property or of liberty secured by the due process clause. (Cites)" 321 U.S. at 7.

An example of the narrow reading courts give to this language is found in Briscoe v. Kusper, 435 F.2d 1046 (7th Cir. 1970), where the court said:

> "It is apparent from the opinions of the Supreme Court in both Snowden and Taylor & Marshall that the rights in question were presented as purely state rights to public employment and were narrowly considered. 435 F.2d at 1053.

Briscoe reversed a lower court decision, Bacon v. Holzman, 264 F.Supp. 120, 124-125 (1967), which erroneously raised the same legal argument that Petitioners now claim.

In their desperation to have Snowden control, Petitioners turn history and the law upside down and claim that voters and candidates should be treated alike, but with NEITHER afforded constitutional protections. (Petition pp. 7-8)

Thus, Snowden must be viewed only in the context of its particular facts. The Court of Appeals accurately spotted the difference between the Snowden complaint and the "broad-guaged" unfairness of denying 3,000,000 citizens an election in which they could exercise the right to vote. (Petitioners' Appendix, p. 25a)

Further Respondents' claim presents not a "mere violation of state law," but a violation of state law plus a constitutional injury--votes denied. Thus, the facts before the Court here preclude Respondents' claims from the application of Snowden.

Viewed in its historial and factual perspective, Snowden is not in conflict with the decision of the Court of Appeals. Therefore, the writ should be denied.

C. THE COURT OF APPEALS GAVE PARRATT FULL CONSIDERATION AND DID NOT LIMIT ITS APPLICATION TO ANY EXTENT.

Petitioners claim that the opinion of the Court of Appeals improperly limits the authority of Parratt because Respondents had a procedural remedy which they did not pursue.

Very simply, this Court undertook to examine whether the negligent deprivation of property would support a

Section 1983 claim. This purpose was clearly stated:

> "This Court has never directly addressed the question of what process is due a person when an employee of a State negligently takes his property." 101 S.Ct. at 1914.

The Court proceeded to answer this question, holding that in the instance before the Court there was no basis for a Section 1983 action because the state law provided adequate procedural remedies to vindicate the injury.

This Court did not undertake to explore whether or not the deprivation of liberty or life interests would be similarly disposed of, and in fact did not reach those issues at all.

Justice Blackmun in his concurring opinion emphasized the inapplicability

of the Parratt decision to life and liberty interests. He stated:

> "This suit concerns the deprivation only of property and was brought only against supervisory personnel, whose simple "negligence" was assumed but, on this record, not actually proved. I do not read the Court's opinion as applicable to a case concerning deprivation of life or of liberty.... I continue to believe that there are certain governmental actions that, even if undertaken with a full panoply of procedural protection, are, in and of themselves, antithetical to fundamental notions of due process." 101 S.Ct. at 1918 (citations omitted).

If Parratt is good authority for deprivation of property interests, and not life or liberty interests, is there possibly some other aspect of what was before the Court which makes it applicable to Respondents' claims? Respondents suggest not, and direct the Court's attention to the observations

of Justice Powell in his concurring opinion where he said:

> "The present case, involving a $23 loss, illustrates the extent to which constitutional law has been trivialized, and federal courts often been converted into small-claims tribunals." Id. at 1923, n. 13.

Respondents show that Petitioners belittle the near sacred rights of Respondents by comparing them to the de minimis claim asserted in Parratt. Further, Respondents have checked every case in which Parratt has been cited and find no support for Petitioners' interpretation.

Petitioners attempt, however, to apply Parratt because Georgia has a remedy of mandamus which Respondents did not exhaust. It has long been the law that other remedies need not be

exhausted prior to prosecution of a Section 1983 action. Monroe v. Pape, 365 U.S. 167, 183 (1961).

Petitioners have simply not shown that Parratt applies to Respondents' action at all.

Petitioners further take the Court of Appeals to task for breaking a "half-century" line of precedents regarding the substantive due process language of the opinion. Petitioners obscure the Court of Appeals' extensive review of the leading cases which clearly recognize the right to vote as a right protected by the first amendment. (Petitioners' Appendix, pp. 18a-20a). The Court of Appeals also throughly discussed Briscoe v. Kusper,

435 F.2d 1046 (7th Cir. 1970) where the liberty interest at stake there was analyzed as stemming from the first amendment. Respondents, as well, have cited these cases and other first amendment cases throughout, commencing with the trial court, and continue to rely on them as authority here.

The Court of Appeals specifically addressed the Parratt decision in terms of the application of the protections guaranteed in the Bill of Rights.

> "The Parratt Court was not required to define the limits of those substantive rights which are grounded in the Bill of Rights and applied to the states because of their incorporation into the due process clause of the fourteenth amendment." (Petitioners' Appendix, p. 28a).

Thus, the Court of Appeals was clearly analyzing the claims raised by Respondents in terms of rights grounded in the Bill of Rights, including, of course, the first amendment.

Petitioners' arguments that the Court of Appeals decision improperly limits Parratt are without merit, and certainly do not substantiate any basis for the grant of a writ.

II. NO CONFLICT WITH APPELLATE COURT DECISIONS

A. THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH THE DECISIONS OF ALL OTHER APPELLATE COURTS.

Most of the cases cited in Section II.A of Petitioners' brief asserting incompatibility with other districts are factually inapposite, because they deal with errors or irregularities that occur within the election administration process (Diagram B situations). In the case now before the Court, Respondents seek vindication of the FAILURE TO CALL AN ELECTION (a Diagram A situation).

Four of the cases cited, Powell v. Power, 436 F.2d 84 (2nd Cir. 1970); Hennings v. Grafton, 523 F.2d 861 (7th Cir. 1975); Pettengill v. Putnam County R-1 School District, 472 F.2d 121 (8th Cir. 1973); and Johnson v. Hood, 430 F.2d 610 (5th Cir. 1970), involved counting of votes in local elections. It is elementary that when no election has been held, Respondents cannot in any way be seen as challenging vote counting procedures. Most of these cases were accurately and adequately distinguished by the Court of Appeals (Petitioners' Appendix, pp. 20a-25a).

Mrazek v. Suffolk County Board of Elections, 630 F.2d 890 (2nd Cir. 1980) involved a challenge to candidate selection procedure. In Moore v.

Kusper, 465 F.2d 265 (7th Cir. 1072), the plaintiffs challenged the method of selection of persons to supervise elections. Again, no denial of an election is implicated.

In Briscoe v. Kusper, 435 F.2d 1046 (7th Cir. 1970), the court found a violation of due process in the procedures for handling candidates' petitions. This case is quite compatible with Respondents' claim because neither a candidate nor a voter can be denied access to a ballot without due process of law. Id., at 1054. (Briscoe found a due process violation even though city officials were found to have acted "in good faith." Id., at 1058.)

Thus, the cases cited by Petitioners in this section are inapposite, because, unlike Respondents' claim, they do not implicate "the very integrity of the election process."

Since there are no conflicts with other circuit court decisions, Petitioners should be denied a writ of certiorari.

B. THE HOLDING OF THE COURT OF APPEALS DOES NOT CONFLICT WITH DECISIONS IN OTHER CIRCUITS.

Petitioners did not "merely" violate a state statute. They acted deliberately in dispensing with a special election, thereby denying Respondents the right to vote

(Petitioners' Appendix, p. 26a). This statutory violation coupled with a violation of a Constitutional right distinguishes Respondents' case from all of the other cases cited in this section of the Petition, p. 14. All other cases, without exception, involve violation of a state statute without any constitutional injury. Interestingly, none of the cases cited are voting cases.

Since these cases can be distinguished on their facts, there is no conflict for this Court to resolve. Certiorari should be denied.

III. A CASE OF FIRST IMPRESSION IN THE FIFTH CIRCUIT IS NOT AN EXPANSION OF FEDERAL JURISDICTION.

What Petitioners call "expanded federal jurisdiction" is really a case of first impression in the Fifth Circuit. Petitioners' Appendix, p. 17a.

The Governor and the Secretary of State have injured Respondents and the entire state by withholding this special election. This is a case of bare usurpation of power rarely seen in the history of our country. Yet the jurisdiction invoked in this case follows the same tests as numerous other cases heard and decided in plaintiffs' favor for state action denying the vote under 42 U.S.C. Section 1983.

Federal courts, only with reluctance and after careful deliberation, have been forced, by flagrant violations of state law by state officials which deprive citizens of a federally protected right, to grant relief.

It is not the law that makes this a case of first impression, and thus so rare. It is the facts. (Petitioners' Appendix, pp. 2a-8a and 51a-61a.)

Since jurisdiction is not expanded, the writ should be denied.

IV. IMPORTANCE OF THE ISSUES

The failure of state officials to call a special election, and the consequent disenfranchisement of Respondents and 3,000,000 voters, is "a fundamental breakdown of the democratic system." (Petitioners' Appendix, p. 28a). It goes beyond questions of comity and federalism.

The same Petitioners, who have violated their oath of office by disobeying state laws to usurp citizens' votes, are now urging this Honorable Court to abandon the United States Constitution, and force Respondents to work their way through the state court system.

If Petitioners succeed in this dilatory application, Respondents will lose the right to vote for all practical purposes. Without the district court's injunction, the appointed de facto justice will run as incumbent in the next general election (November 1982; qualifying in June 1982). After the passage of this time, it will be impossible to recover the advantages of a free and open election (without an incumbent) which existed in November 1980, at the time of Justice Bowles resignation when the special election should have been called.

CONCLUSION

Respondents have shown that the decision of the Court of Appeals concerned the unique facts before it. That decision does not conflict with decisions of this Court or other Circuit Courts. We therefore urge that an order be entered promptly denying the Petition for Certiorari so that the election required by Georgia law may be held and the Respondents may have restored to them their right to vote, the most precious right of free people.

Respectfully submitted,

WILLIAM B. HOLLBERG
1750 Peachtree Street
Suite 375
Atlanta, Georgia 30309

WILLIAM F. RUCKER
1400 Bank of the South
55 Marietta Street
Atlanta, Georgia 30303

December 25, 1981

PLEASE ADDRESS
ALL CORRESPONDENCE TO:

William B. Hollberg
1750 Peachtree Street
Suite 375
Atlanta, Georgia 30309

Office of the Governor

Atlanta, Georgia 30334

December 5, 1980

Honorable David B. Poythress
Secretary of State
State Capitol
Atlanta, Georgia 30334

Dear Mr. Poythress:

Attached you will find a copy of Justice Bowles' letter of November 20, 1980, to the Governor resigning his presently held commission as an Associate Justice of the Supreme Court. Such resignation is to become effective upon the last day of his present term of office which is December 31, 1980. Also attached is a copy of the Governor's letter of acceptance of such resignation effective on December 31, 1980.

No where within Justice Bowles' letter is there any mention, reference or allusion as to what action Justice Bowles intends to take in reference to the term of office as an Associate Justice of the Supreme Court to which he was elected in the November 1980 general election. It is my understanding that any future action in reference to such term of office, if any, will be initiated by the Justice in writing and directed to the Governor. Therefore, clearly none of the circumstances which are set forth within Code Section 34-1514 have occurred which would require the calling of a special election.

Justice Bowles is scheduled to be administered the oath of office by the Governor on the 15th of this month for his newly elected term, along with the other members of the appellate courts who were also elected to terms of office in the 1980 general election. Unless Justice Bowles should, by appropriate communication to the Governor, otherwise indicate, we expect Justice Bowles to enter upon the duties of his new term of office on January 1, 1981. While it is only private supposition upon my part at this time, I would not be surprised if sometime after Justice Bowles assumes his newly elected office on the first of January, he should resign. In anticipation of this eventuality, we have requested the Judicial Nomi-

nating Commission to initiate their screening processes of candidates to fill by executive appointment any vacancy which might thus occur.

Sincerely,

Charles E. Tidwell

CET:yl

RESPONDENTS' Exhibit "A"
page 2 of 2

SUPREME COURT OF GEORGIA
STATE JUDICIAL BUILDING
ATLANTA, GEORGIA 30334

November 20, 1980

Honorable George Busbee
Governor, State of Georgia
Atlanta, Georgia

Dear Governor Busbee,

It is with deep regret I find I must resign my Commission as Associate Justice of the Supreme Court of Georgia, effective December 31, 1980.

My service on the court has been rewarding and my faith in the judicial system remains strong. Your cooperation with the judicial branch of government has been exemplary.

My best wishes to you and the standards of good government for which you stand.

Sincerely yours,

Jesse P. Bunten

RESPONDENTS' Exhibit "B"

David B. Poythress
SECRETARY OF STATE

Secretary of State
State Capital
Atlanta
30334

December 15, 1980

Ms. Kathleen Kessler
Chair, Common Cause/Georgia
403 W. Ponce de Leon
Suite 117
Decatur, Georgia 30030

Dear Ms. Kessler:

This is in response to your letters of December 3 and December 9, concerning the effect of the resignation submitted by Justice Bowles to the Governor on November 20, 1980.

By letter dated December 5, 1980, the Governor's Executive Counsel, Mr. Charles Tidwell, indicates that Justice Bowles' resignation, and the Governor's acceptance thereof, were intended by both men to relate to Justice Bowles' presently held commission which expires December 31, 1980. Justice Bowles has verbally confirmed to me that such was his intention and that he does intend to enter upon the duties of the new term of office beginning on January 1, 1981.

Under these circumstances, it appears that a special election to fill the term of office beginning on January 1, 1981, is not required or permitted by Georgia law.

Very truly yours,

David B. Poythress
Secretary of State

DBP:ga

cc: Governor George Busbee
Justice Jesse G. Bowles
Honorable Arthur K. Bolton

RESPONDENTS' Exhibit "C"

Jones

Office of the Governor

Atlanta, Georgia 30334

George Busbee
GOVERNOR

November 21, 1980

Honorable Jesse G. Bowles
Associate Justice
Supreme Court of Georgia
State Judicial Building
Atlanta, Georgia 30334

Dear Justice Bowles:

This will acknowledge receipt of your letter of November 20 in which you tender your resignation as an Associate Justice of the Supreme Court of Georgia effective December 31, 1980. As requested, I hereby accept your resignation effective on said date.

Let me take this opportunity to acknowledge and thank you for your public service to the citizens of this State. Your contributions as a member of the judiciary have been exemplary, and I extend to you my very best wishes for the future.

With kindest personal regards, I am

Sincerely,

George Busbee

GB:ctl

RESPONDENTS' Exhibit "U"

Petitioner's Brief

Supreme Court, U.S.
FILED
APR 5 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1055

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DAVID B. POYTHRESS, *et al.*,
Petitioners,

v.

ELIZABETH B. DUNCAN, ELIZABETH N. STOUT and KATHLEEN KESSLER,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, UNIT B, NOW THE ELEVENTH CIRCUIT

BRIEF OF PETITIONERS

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QUESTIONS PRESENTED

I. Whether the appointment by Governor Busbee of Justice Gregory to the Supreme Court of Georgia, where it is alleged that Georgia law calls for a special election, supports an action by prospective voters under 42 U.S.C. § 1983 for a denial of due process, notwithstanding *Snowden v. Hughes*, 321 U.S. 1 (1944).

II. Assuming due process to be required in this instance, whether the availability of a mandamus action in State Court to compel Secretary of State Poythress to call a special election satisfies the requirements of 42 U.S.C. § 1983 and the Fourteenth Amendment, pursuant to *Parratt v. Taylor*, 451 U.S. 527 (1981).

III. Whether the district court should have abstained, pursuant to *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), pending resolution in State court of the question whether State law requires a special election in this instance.

PARTIES

The parties in this case are George D. Busbee, Governor of the State of Georgia; David B. Poythress, Secretary of State of Georgia; Hardy Gregory, Jr., Associate Justice of the Supreme Court of Georgia, and Jesse G. Bowles, Associate Justice of the Supreme Court of Georgia retired, as petitioners; Elizabeth B. Duncan, Elizabeth N. Stout, and Kathleen Kessler, as respondents.

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5 INT. ENCY. OF THE SOC. SCI. "Federalism," Elazar 353 (1968)..... 33

Stewart, "Pyramids of Sacrifice? Problems of Federalism in Mandatory State Implementation of National Environmental Policy," 86 YALE L.J. 1196 (1977)..... 33, 34

Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1st ed. 1833)..... 30

Tribe, AMERICAN CONSTITUTIONAL LAW (1978)..... 24

Tribe, "Unraveling *National League of Cities:* The New Federalism and Affirmative Rights to Essential Government Services," 90 HARV.L.REV. 1065 (1977)..... 35

Wells, "The Role of Comity in the Law of Federal Courts," 60 N.CAR.L.REV. 59 (1981)..... 42

NO. 81-1055

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DAVID B. POYTHRESS, *et al.*,
Petitioners,

v.

ELIZABETH B. DUNCAN, ELIZABETH N. STOUT and KATHLEEN KESSLER,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, UNIT B, NOW THE ELEVENTH CIRCUIT

BRIEF OF PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported as *Duncan v. Poythress*, 657 F.2d 691 (5th Cir. 1981). [C.A. 1a-45a].* The decision of the Court of Appeals denying petitioners' motion for rehearing and suggestion of rehearing *en banc* (without further opinion) is not reported. [C.A. 46a-47a]. The final opinion of the United States District Court for the North-

*References are to the Joint Appendix, *e.g.*, [J.A. __]; the Appendix to the Petition for Certiorari, *e.g.*, [C.A. __]; and to the Record, *e.g.*, [R. __].

ern District of Georgia which occasioned this petition is reported as *Duncan v. Poythress*, 515 F.Supp. 327 (N.D. Ga. 1981). [C.A. 48a-49a (judgment); C.A. 50a-82a (order)]. The opinion of the District Court denying the defendants' motion to dismiss is not reported. [C.A. 83a-90a].

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on September 28, 1981. A timely petition for rehearing and a suggestion for rehearing *en banc* were fiied on October 9, 1981, and were denied on November 18, 1981. The petition for a writ of certiorari was filed on December 4, 1981, and was granted on February 22, 1982. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment of the United States Constitution, Section I:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the

jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Article VI, Section II, Paragraph III of the Constitution of the State of Georgia of 1976:

"The Justices [of the Supreme Court] shall hold their offices for six years, and until their successors are qualified. They shall be elected by the people at the same time and the same manner as members of the General Assembly. In case of any vacancy which causes an unexpired term, the same shall be filled by executive appointment, and the person appointed by the Governor shall hold his office until the next regular election, and until his successor for the balance of the unexpired term shall have been elected and qualified. The returns of such elections shall be made to the Secretary of State, who shall certify the result to the Governor, and commission shall issue accordingly."

Ga. Code § 34-1514:

"Whenever any primary or election shall fail to fill a particular nomination or office and such failure cannot be cured by a run-off primary or election, or whenever any person elected to public office shall die or withdraw prior to taking office, then the authority, with whom the candidates for such nomination or office filed their notice of candidacy, shall thereupon call a special primary or election to fill such position.

STATEMENT OF THE CASE

Elizabeth B. Duncan and Elizabeth N. Stout initiated this suit in the United States District Court for the Northern District of Georgia. [J.A. 5]. The complaint brought a civil rights action pursuant to 42 U.S.C. § 1983 against State officials alleging violation of the Equal Pro-

tection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution, in that the plaintiffs were denied the right to vote for Associate Justice of the Supreme Court of Georgia in a special election. [J.A. 16-17]. The plaintiffs, in addition, asserted a pendent State claim of fraud, and sought declaratory and injunctive relief, damages and attorneys' fees. [J.A. 13, 18-20]. There were no allegations that the actions taken were based upon any constitutionally prohibited discriminatory intent. [C.A. 87a]. Furthermore, the plaintiffs did not assert that they lacked an effective remedy in State court. [C.A. 9a n. 4]. Jurisdiction of the district court was invoked under 28 U.S.C. § 1343(3) and 28 U.S.C. § 2201, *et seq.* [J.A. 8].

The suit arises from facts which are largely undisputed. The Georgia Constitution provides for the popular election of Supreme Court Justices to six-year terms. Art. VI, Sec. II, Para. III, Constitution of the State of Georgia of 1976 (Ga. Code Ann. § 2-3103). If a vacancy occurs in any unexpired term, the Governor appoints a successor. *Id.* The election code of Georgia provides that whenever a person elected to public office withdraws before taking office, the vacancy is to be filled by a special election, in this situation to be called by the Secretary of State. Ga. Code § 34-1514. The dispute in this case is whether the vacancy caused by the resignation of Justice Jesse G. Bowles from the Supreme Court of Georgia should have been filled by appointment or by a special election.

Jesse G. Bowles became an Associate Justice of the Supreme Court of Georgia by the appointment of Governor Busbee on April 25, 1977. [C.A. 53a]. Justice Bowles was subsequently elected to fill a term of office as an Associate Justice until December 31, 1980. *Id.* On Novem-

ber 4, 1980, Justice Bowles was re-elected to a six year term to commence January 1, 1981. [C.A. 54a, 59a].

As a result of some personal problems, Justice Bowles wrote Governor Busbee on November 20, 1980, stating "I find I must resign my Commission as Associate Justice of the Supreme Court of Georgia, effective December 31, 1980." [C.A. 55a, Pl. Ex. A; R. 185, 188]. Pursuant to the request of two citizens, Elizabeth B. Duncan and Elizabeth N. Stout—later to become plaintiffs in this action—Secretary of State David B. Poythress inquired of Justice Bowles whether he intended to withdraw from his present term or the new term to which he had been elected on November 4, 1980. [C.A. 58a-59a]. Justice Bowles responded that he did not intend to withdraw from the term to which he had been elected and that he intended to take the oath of office and enter into the duties of his new term. [C.A. 58a-59a; Pl. Ex. H; R. 185, 188]. Based upon these assurances of Justice Bowles, Secretary of State Poythress decided a special election was not necessary. [C.A. 59a]. Secretary of State Poythress wrote Ms. Duncan and Ms. Stout informing them of his investigation, its results and his decision. [Pl. Ex. H; R. 185, 188].

On December 15, 1980, Justice Bowles took the oath of office for his new term, and on January 1, 1981, he entered upon the duties of his new term. [C.A. 59a; R. 71-72]. As a result of his personal problems, Justice Bowles decided to resign his new term on January 5, 1981, and so notified the Governor. [C.A. 59a-60a; Pl. Ex. J; R. 185, 188]. On January 8, 1981,* Governor Busbee appointed Hardy Gregory, Jr., to fill the vacancy left by Justice Bowles' resignation. [C.A. 60a].

*This speedy appointment was made possible by Justice Bowles' November 20th letter, which was intended to and had the effect of initiating the judicial nominating process. [R. 215].

Plaintiffs Duncan and Stout filed their complaint in this case on January 30, 1981. [J.A. 5]. On February 18, 1981, defendants filed a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on the ground that the complaint failed to state a claim upon which relief could be granted. [J.A. 37]. The motion was denied on March 10, 1981. [C.A. 83a-90a]. A trial on the merits of the case was held April 1-2, 1981, [R. 1-334], at which time Kathleen Kessler was added as a plaintiff. [R. 3-10]. At the end of the plaintiffs' case, defendants renewed their motion for dismissal, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. [J.A. 60]. The court denied the motion. [J.A. 61].

On April 28, 1981, the district court rendered its decision on the merits, finding that State law required a special election and that in failing to call the election Secretary of State Poythress and Governor Busbee violated plaintiffs' rights under the Due Process Clause of the Fourteenth Amendment. [C.A. 70a-77a]. The equal protection argument was denied [C.A. 67a-70a], and the pendent State claim was not reached [C.A. 80a-81a]. The district court ordered that a special election be held, that Justice Gregory be prohibited from running as an incumbent, and that the plaintiffs be awarded one dollar in damages and be awarded attorneys' fees and costs. [C.A. 81a-82a]. A notice of appeal was filed the following day. [R. 711].

On September 28, 1981, a panel of the Court of Appeals for the Fifth Circuit affirmed the decision of the district court, holding that the Due Process Clause of the Fourteenth Amendment as enforced through 42 U.S.C. § 1983 protects the right to vote in State elections or State officials. [C.A. 27a]. In so holding, the Court of Appeals

specifically distinguished the holding of this Court in *Snowden v. Hughes*, 321 U.S. 1 (1944), concluding that *Snowden* involved only a "garden variety" challenge to ballot counting, whereas the instant case involved a fundamental breakdown of the democratic system. [C.A. 21a-28a]. The Court of Appeals also determined that this Court's decision in *Parratt v. Taylor*, 451 U.S. 527 (1981), is not controlling in that the instant case is grounded on substantive due process, and *Parratt* applies only to procedural due process cases. [C.A. 28a-29a]. Finally, the appellate court held that the abstension doctrine of *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), is inappropriate here in that the State law is unambiguous [C.A. 13a-15a], and the suspension of the fundamental rights involved would be unjustifiable [C.A. 15a-17a].

A petition for rehearing and a suggestion for rehearing *en banc* were timely filed and, on November 18, 1981, were denied. A petition for certiorari was filed on December 4, 1981, and was granted on February 22, 1982.

SUMMARY OF ARGUMENT

At the heart of this case is a dispute over whether the proper method was used for the selection of a Justice of the Georgia Supreme Court. The Governor and the Secretary of State determined that State law required an appointment; the plaintiffs asserted that an election was appropriate. There was neither allegation or finding that the decision of the Georgia officials was based upon constitutionally prohibited motives. The district and appellate courts held that Georgia law required that the Justice be elected, found that his appointment deprived potential voters of due process, and ordered an election. We submit

that any question as to the selection of Georgia Supreme Court Justices is primarily a matter of State concern, and thus should be decided by the Georgia Courts.

I.

Snowden v. Hughes, 321 U.S. 1 (1944), held that alleged violations of State election laws by State officials, absent invidious discrimination, do not rise to the level of a Fourteenth Amendment violation. The Fourteenth Amendment, like the whole of the Constitution, must be read in the light of Federalism. To assert Federal control over State elections—absent invidious discrimination—is to arrogate to the Federal domain a function essential to the separate and independent existence of the States.

The rationale of *Board of Regents v. Roth*, 408 U.S. 564 (1972), focuses at a different level of the inquiry but leads to the same result as *Snowden*. *Roth* provides a general analysis of due process, assuming the Fourteenth Amendment to apply. The right to vote in State elections is not, contrary to the appellate court decision, a right of liberty or property protected by the Due Process Clause.

The outcome counseled by *Snowden* and *Roth* comports fully with the guiding principle of Federalism. The Constitution as originally adopted was built upon the foundation of the dual sovereignty of the State and Federal governments. The Tenth Amendment clearly strengthened the doctrine of Federalism, establishing a specific limit upon the means by which the Federal government may execute its enumerated powers. *National League of Cities v. Usery*, 426 U.S. 833 (1976). Thus limited, the Federal government may not exercise its powers by a means that prohibits a State from performing functions essential to its sovereignty, and determining the manner of selecting Supreme Court Justices is such a function.

The Fourteenth Amendment did not change the basic structure of the Union, but took from the States the ability to discriminate against persons on the basis of invidious classifications. *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

Since the Constitution should be read in the light of the guiding principle of Federalism, it is all the more appropriate that an enactment of Congress be likewise interpreted. 42 U.S.C. § 1983, a statute enacted pursuant to the enforcement power of the Fourteenth Amendment, should not be construed so as to destroy the basic structure of the Union. *Fair Assessment in Real Estate Association, Inc. v. McNary*, ___ U.S. ___, 102 S.Ct. ___, 70 L.Ed.2d 271 (1981).

II.

Should § 1983 and due process be found to apply in this case, they are nevertheless satisfied. *Parratt v. Taylor*, 451 U.S. 527 (1981), held that in a § 1983 claim, where the prerequisites of a due process violation are met, the Fourteenth Amendment is satisfied if there exists an adequate State remedy. It is undisputed in this case that the plaintiffs have available an adequate remedy at State law in an action for mandamus. Thus, the requirements of due process should be deemed satisfied.

III.

If it be found that due process applies and is not satisfied by the availability of a State action in mandamus, the abstension doctrine promulgated in *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), clearly applies in this case. *Pullman* counsels, based in part upon deference to the function of the States in the Federal

system, that a district court should abstain from deciding a constitutional issue that can be obviated by a definitive resolution of State law. In the case at bar the entire constitutional claim hinges upon the unsettled question of State law whether a special election is required in this instance. A resolution of this question by a State court would have definitively and expeditiously answered the question.

In conclusion, this case can and should be resolved with reference to the proper role of the States in our Federal system. The decision of the Court of Appeals should be reversed.

ARGUMENT

I. Neither the Fourteenth Amendment nor 42 U.S.C. § 1983 reaches alleged violations of State election laws, absent invidious discrimination.

A. The holding of *Snowden v. Hughes* controls and should be followed in this case.

1. *Snowden v. Hughes* held that neither the Privileges and Immunities Clause, the Equal Protection Clause, nor the Due Process Clause reaches questions of State elections of State officers, absent invidious discrimination.

Snowden v. Hughes, 321 U.S. 1 (1944), held that absent invidious discrimination the Fourteenth Amendment does not reach State elections of State officers. *Snowden* thus controls the instant case and requires the reversal of the decision of the Court of Appeals.

Snowden was before this Court to review the granting of the defendants' motion to dismiss. The complaint in *Snowden* alleged that the plaintiff was one of several candidates for State senator in the Republican primary.

The primary was to yield two Republician nominees and, as a result of several rules based upon the Illinois plan of proportional representation, nomination was tantamount to election. After the primary the plaintiff was certified by Cook County officials as having the second highest number of votes, and in the normal course of events he was assured a Senate seat. However, the State Canvassing Board—in direct contravention of State law—refused to grant the plaintiff a certificate of nomination necessary to have his name placed on the general election ballot. The complaint alleged the members of the State Canvassing Board "willfully, maliciously and arbitrarily" failed and refused to file the requisite certificate, that they conspired and confederated for that purpose, and that their action constituted "an unequal, unjust and oppressive administration" of the laws of Illinois. 321 U.S. at 4.

In summarizing the alleged cause of action, this Court found:

> "In substance petitioner's alleged cause of action is that the members of the State Primary Canvassing Board, acting as such but in violation of state law, have by their false certificate or proclamation and by their refusal to file a true certificate deprived petitioner of nomination and election as representative in the state assembly." 321 U.S. at 5.

As in the case at bar, the plaintiff in *Snowden* alleged only a violation of State election law, with no allegations of invidious discrimination, as the basis for an asserted infringement of the Fourteenth Amendment. The plaintiff in *Snowden* alleged no "garden variety challenge to ballot counting" as the Court of Appeals characterized it; rather, unlike the case at bar, he claimed a blatant, malicious conspiracy of State officials in violation of State law to deny him a State office by refusing to certify his nomina-

tion. The facts asserted in *Snowden* thus involved a state of affairs certainly far worse than even alleged in the instant case.

Taking the allegations of the complaint as true, the *Snowden* Court searched for some basis in the Fourteenth Amendment that could conceivably sustain the claim. Looking first to the Privileges and Immunities Clause, the Court dismissed that Clause as a basis for the claim in that it protects only those rights incident to citizenship of the United States, not those pertaining to State citizenship as alleged by the *Snowden* plaintiff. 321 U.S. at 6-7.

The Court next analyzed the Due Process Clause. Reasoning from cases involving the right to vote for State offices, the *Snowden* Court held that the Due Process Clause of the Fourteenth Amendment does not reach State elections of State officials. The *Snowden* Court, dealing with the specific question of due process, stated:

> "More than forty years ago this Court determined that an unlawful denial by state action of a right to state political office is not a denial of a right of property or of liberty secured by the due process clause. Only once since has this Court had the occasion to consider the question and it then reaffirmed that conclusion, as we reaffirm it now." 321 U.S. at 7 (citations omitted).

In arriving at this decision this Court cited and applied State voting cases, making it clear that the right to vote and the right to run for State political office are inextricably intertwined, and that the principles which apply to candidates apply with equal force to voters.[1]

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[1] *E.g., Lubin v. Panish*, 415 U.S. 709, 716 (1974); *Bullock v. Carter*, 405 U.S. 134, 143 (1972).

Finally, the *Snowden* Court analyzed the plaintiff's equal protection claim. The Court found first that, like the instant case, "[t]here is no allegation of any facts tending to show . . . any intentional or purposeful discrimination between persons or classes." 321 U.S. at 7. The Court reasoned:

> "The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination." 321 U.S. at 8.

Thus, the *Snowden* Court dismissed any potential equal protection claim.

Absent some assertion of invidious discrimination, the *Snowden* Court concluded the Fourteenth Amendment does not reach alleged violations of State election law. This conclusion, the Court found, is one supported by the principle of Federalism. State elections are essentially matters within the exclusive province of the State, and absent some form of prohibited discrimination the Fourteenth Amendment was not intended to make local elections matters of national concern. The holding of *Snowden v. Hughes* thus controls the case at bar.

2. The purported distinction between *Snowden v. Hughes* and the case at bar is unfounded, conflicts with established Fourteenth Amendment analysis, and creates an unmanageable standard for adjudication of Federal jurisdiction.

The decision of the Court of Appeals initially acknowledged the controlling nature of *Snowden* but attempted to distinguish it. "At first glance," the Court of Appeals stated, "the broad language of *Snowden* . . . would appear to preclude the Section 1983 claim filed by the Georgia

voters." [C.A. 27a]. In seeking to distinguish the instant case, the Court of Appeals found that *Snowden* concerned a mere "garden variety challeng[e] to the manner in which ballots were counted by State election officials"; whereas the case at bar involved a fundamentally unfair practice which threatens the democratic system. [C.A. 27a-28a]. On this basis the panel held *Snowden* does not control, and that the Due Process Clause protects the asserted interest. *Id.*

This purported distinction is patently incorrect. *Snowden* did not involve a "garden variety" challenge to ballot counting—indeed it had nothing to do with ballot counting at all—but concerned facts far more threatening to the democratic system than those assertedly involved here. The plaintiff in *Snowden* claimed a blatant, malicious conspiracy of State officials in violation of State law to deny him a State office. If, as the *Snowden* Court held, the Fourteenth Amendment does not reach such claims, it can not possibly reach the efforts of the Georgia officials presented here.

More important, however, is the fact that the "garden variety challenge" versus "fundamentally unfair practice" distinction posited by the Court of Appeals conflicts with accepted Fourteenth Amendment principles. In *Board of Regents v. Roth*, 408 U.S. 564 (1972), this Court established the fact that the determination of when due process applies is not dependent upon the weight of the deprivation. Instead, one looks to the nature of the interest—either liberty or property. While we assert that the nature of the interest (voting in State elections) is not a liberty or property interest protected by due process, the Court of Appeals focused on the grievousness of the wrong (a fundamentally unfair practice) and held that it triggered due process protection. The holding of the Court of

Appeals thus erroneously resurrects the wooden "rights–privileges" distinction laid to rest by this Honorable Court in *Roth*.

Reliance upon a differentiation between "garden variety challenges" and "fundamentally unfair practices" creates an unmanageable standard for the adjudication of Federal jurisdiction. Such an amorphous distinction will keep most litigants in court beyond a motion to dismiss, making Federal courts the battleground of the future for local election contests, and it will inevitably result in widely differing results in the determination of jurisdiction. Lower courts will no doubt differ on whether, for example, a registrar's late mailing of absentee ballots is a "garden variety" violation–warranting dismissal–or a "fundamentally unfair practice"–warranting Federal adjudication. This approach of the Court of Appeals creates a serious threat to the goal of uniformity in Federal decisions. *See, Hanna v. Plumer*, 380 U.S. 460 (1965).

3. The holding of *Snowden v. Hughes* has been reaffirmed and should be followed in this case.

Two recent cases decided by this Court have discussed the reach of the Fourteenth Amendment, *Oregon v. Mitchell*, 400 U.S. 112 (1970), and *City of Mobile v. Bolden*, 446 U.S. 55 (1980), and reaffirmed the principles announced in *Snowden v. Hughes*. Based upon these reaffirmations and upon the guiding principle of Federalism to which they give effect,[2] *Snowden* should be followed in this case.

In *Oregon v. Mitchell*, 400 U.S. 112 (1970), this Court considered the question whether the Fourteenth Amend-

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[2] See Section I.C.

ment gives Congress control over voting qualifications in State elections. So far as is germane to this case, *Oregon* involved the question whether that portion of the Voting Rights Act Amendments of 1970 [3] which lowered the voting age in State and local elections to 18 takes from the States the power to control their own elections. Justice Black, announcing the judgment, held that this portion of the act was unconstitutional.

Justice Black first reasoned, following Justice Harlan's persuasive historical analysis,[4] that it was clear the Framers of the Constitution intended the States, as provided in the Tenth Amendment, to keep their power to regulate elections. Justice Black found that the powers of the States over their own elections must be maintained if we are to retain the constitutional structure of dual sovereignty. It was obvious, Justice Black reasoned, that the Constitution as a whole reserved the powers of the States over elections, and that power was restricted only to the extent that later amendments—the Fourteenth, Fifteenth, Nineteenth and Twenty-fourth—have narrowed that power.

Turning specifically to the Civil War Amendments which the Voting Rights Act was intended to enforce, Justice Black found that they were intended, above all else, to deny the State authority to discriminate against persons on account of race. Although the Equal Protection Clause had been used to prevent other forms of discrimination, he reasoned:

> "it cannot be successfully argued that the Fourteenth Amendment was intended to strip the States of their power, carefully preserved in the original Constitution, to govern themselves." 400 U.S. at 127.

[3] P.L. 91-285, 84 Stat. 314.

[4] 400 U.S. at 152-229.

The portion of the Voting Rights Act dealing with the voting age in State elections, violating the domain reserved to the States, was for this reason found unconstitutional. We submit that the principle thus reaffirmed in *Oregon*, that the Fourteenth Amendment does not establish Federal power over State elections, controls the case at bar.

Justice Harlan's concurrence in *Oregon* made a convincing argument that no portion of the Fourteenth Amendment was intended to restrict the authority of the States to allocate their political power as they see fit.[5] Likewise, the dissenting opinion of Justices Brennan, White and Marshall made an equally compelling case for the view that, although the Fourteenth Amendment does not take from the States nor grant to the Federal government the plenary power to regulate suffrage, it does give the Federal government the power to invalidate discriminatory State legislation.[6] We need not resolve *Oregon's* dichotomies, because it is perfectly apparent that these Justices would agree that, absent some showing of discrimination that would implicate the Equal Protection Clause, the Fourteenth Amendment does not—and certainly the Due Process Clause does not—give the Federal Government power over the State election of State officials.

This proposition was resoundingly approved in the most recent case to address the question, *City of Mobile v. Bolden*, 446 U.S. 55 (1980). In *Mobile* this Court was asked to determine whether the at-large election of the City of Mobile Commission violated the Fourteenth and Fifteenth Amendments by unfairly diluting black voting

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[5] *Id.*

[6] 400 U.S. at 229-81.

strength. Holding that no such violation occurred, this Court found:

> "More than 100 years ago the Court unanimously held that 'the Constitution of the United States does not confer the right of suffrage upon anyone. . . .' *Minor v. Happersett*, 21 Wall. 162, 178. . . . It is for the States 'to determine the conditions under which the right of suffrage may be exercised . . ., absent of course the discrimination which the Constitution condemns,' *Ibid.*" 446 U.S. at 76-77.

The *Mobile* Court found nothing in the Fourteenth Amendment which altered the basic structure of the Union, reserving to the States those powers necessary for their sovereign and independent existence. Thus, the broad language of *Reynolds v. Sims*, 337 U.S. 533, 554 (1964)—so heavily relied upon by the court below [C.A. 18a]—that "[u]ndeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as federal elections," must be understood as creating a narrow substantive right to participate equally in elections without suffering invidious discrimination. Absent such invidious discrimination, *Mobile* counsels that the instant case fails to raise a Federal question. As we argue below, the principles of *Snowden*, *Oregon* and *Mobile* fit within the broad plan of Federalism upon which the Constitution is founded.

B. *Board of Regents v. Roth* provides an alternative basis for holding that the Due Process Clause does not apply in this case.

1. According to the rationale of *Board of Regents v. Roth*, the right to vote in State elections is not an interest protected by the Due Process Clause.

Board of Regents v. Roth, 408 U.S. 564 (1972), provides

an alternative rationale to that of *Snowden v. Hughes*, 321 U.S. 1 (1944), for holding that the Due Process Clause is not implicated in this case. Whereas *Snowden*, in deference to the principle of Federalism, holds that the Fourteenth Amendment does not reach State elections absent discrimination, *Roth* provides a general structure for analyzing due process claims assuming the Fourteenth Amendment is applicable.

Roth is a seminal case in the chronicles of due process analysis, holding that due process protection hinges on whether either a liberty or property interest cognizable by the Fourteenth Amendment is implicated. According to the *Roth* analysis, the right to vote in State elections, contrary to the holding of the Court of Appeals [C.A. 27a], is not an interest protected by the Due Process Clause.

a. The right to vote in State elections for State officers is not a right of liberty or property protected by the Due Process Clause.

Minor v. Happersett, 88 U.S. (21 Wall.) 162, 170-78 (1874), held that voting in State elections is not a right guaranteed by the Constitution. *Snowden v. Hughes*, 321 U.S. 1 (1944), specifically held that, like the right to vote in State elections, denial of a right to State office is not a right of property or liberty secured by the Due Process Clause.

The principle announced in these cases was unhesitatingly embraced by this Court in *City of Mobile v. Bolden*, 446 U.S. 55 (1980). In *Mobile*, this Court found that the Constitution did not encompass voting in State elections, absent the type of invidious discrimination that the Constitution condemns. *A fortiori*, voting in State elections is not an interest encompassed by the Due Process Clause.

b. The mere violation of a State law is not an infringement of a right protected by the Due Process Clause.

The *Snowden* Court, exploring all possible bases for the plaintiff's claims to test the propriety of the Defendants' motion to dismiss, specifically concluded that the "violation of a State statute does not infringe the federal Constitution." 321 U.S. at 11. Justice Jackson, in *Gryger v. Burke*, 334 U.S. 728 (1948), expanded upon the reasoning for this principle:

> "We cannot treat a mere error of state law . . . as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question."334 U.S. at 731.

Indeed, every alleged violation of State law would state a Federal question, and the Federal courts would thus be called upon to displace the State courts as the principal expositors of State law. *See, Moore v. Sims*, 442 U.S. 415, 429 (1979). Thus, the violation of a State law, without more—all that is asserted here—does not infringe the Due Process Clause.

c. The right to vote in State elections is not a right which springs from the substantive aspects of the Due Process Clause.

The Court of Appeals held that the right to vote for State officers in State elections is protected by the substantive aspects of the Due Process Clause. This decision is in conflict with a half-century long line of cases standing for the principle that substantive due process protects only the most vital of liberty or property interests, such as " 'the individual's freedom of choice with respect to certain basic matters of procreation, marriage, and family life.' " *Harrah Independent School District v. Martin*, 440

U.S. 194, 198 (1979); *quoting Kelley v. Johnson*, 425 U.S. 238, 244 (1976); *citing Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Stanley v. Illinois*, 405 U.S. 645 (1972), *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Meyer v. Nebraska*, 262 U.S. 390 (1923). Voting in a State election clearly does not involve interests such as procreation, marriage or family life, and is thus not within the narrow range of interests protected by substantive due process.

2. The outcome resulting from the *Roth* analysis is in accord with later decisions of this Court and should be followed in this case.

Like the outcome counseled by *Snowden v. Hughes*, 321 U.S. 1 (1944), the conclusion resulting from *Roth* accommodates the proper relationship between the State and Federal governments in accordance with the concept of Federalism. The principle underlying the result of the *Roth* analysis—that liberty and property should not be construed so broadly as to displace the States as the primary protectors of the rights and property of their citizens—was given controlling weight in *Paul v. Davis*, 424 U.S. 693 (1976).

In *Paul*, this Court was called upon to determine whether the plaintiff's charge that the defendant defamed him, without more, stated a claim for relief under 42 U.S.C. § 1983 and the Fourteenth Amendment. Reasoning that plaintiff's claim was in essence that the violation of a State tort law by State officers was a denial of liberty under the Due Process Clause, this Court held:

> "[S]uch a reading would make the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States. We have noted the 'constitutional shoals'

> that confront any attempt to derive from congressional civil rights statutes a body of general federal tort law; *a fortiori*, the procedural guarantees of the Due Process Clause cannot be the source for such law." 424 U.S. at 701 (citations omitted).

As did the plaintiff in *Paul*, the plaintiffs in the case at bar alleged only a violation of a State law by State officers as a denial of liberty or property under the Fourteenth Amendment. And, as in *Paul*, here there exists a system in State law for the vindication of the plaintiffs' claim.[7] This Court in *Paul* recognized, as we urge it to reaffirm here, that to extend the reach of the Due Process Clause to such claims would upset the balance between the State and Federal governments in the Federal system.

C. The determination that the Fourteenth Amendment does not reach alleged violations of State election laws, absent invidious discrimination, is in accord with the principle of Federalism.

1. The Constitution as originally adopted was based on the dual sovereignty of the State and Federal governments.

The Constitution of the United States embodies the concept of Federalism. "Our Federalism," though not ordained by any one article or any particular clause of the Constitution, is the bedrock upon which the Union was formed, is the central assumption of the Constitution, and has been and continues to be the guiding light of constitutional adjudication for this Court. Although elusive of precise definition, Federalism is best encapsulated by Justice Black in his opinion for the Court in *Younger v. Harris*, 401 U.S. 37 (1971). Federalism, Justice Black stated:

> " is a system in which there is sensitivity to the

[7] See Section II.

> legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." 401 U.S. at 44.

Justice Black's modern articulation of Federalism as the respect by the sovereign Federal government for the legitimate interests of the sovereign State governments traces its lineage through the debates that ushered our Federal Constitution into existence.

THE FEDERALIST, memorializing the debates surrounding the ratification of the Constitution, carry the theme of Federalism throughout. The clearest statement of dual sovereignty as the central constitutional assumption is found in Federalist Paper Number 45, written by James Madison:

> "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs; concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."[8]

This statement by Madison that dual sovereignty was designed upon the premise that the States—not the Federal government—are the principal protectors of the "lives, liberties, and properties" of the people is a thread which runs through this Court's decisions.

This Court's decisions consistently acknowledge that,

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[8] THE FEDERALIST (Modern Library ed.) 303.

according to the original understanding, the sovereignty of the States is essential to the structure of the Union. "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States," declared Chief Justice Chase, speaking for the Court in *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1868).

At least since *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 410 (1819), this Court has recognized that State and Federal powers must be preserved in a delicate equipoise in the Federal System. This Court first clearly announced the concept of dual sovereignty in *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1859), used it as a principle of constitutional adjudication throughout the decades,[9] and resoundingly reaffirmed it in *National League of Cities v. Usery*, 426 U.S. 833 (1976).

2. The Tenth Amendment reinforced the doctrine of dual sovereignty.

The Tenth Amendment reinforced the principle of dual sovereignty inherent within the original Constitution; it states:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

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[9] *See e.g., Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1868):

"Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the Confederate government, which acted with powers, greatly restricted, only upon the States. But in many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized."

See generally, Tribe, AMERICAN CONSTITUTIONAL LAW 302-03 n. 13 (1978) (citing cases).

This Amendment is embodied within the Bill of Rights, Amendments written and ratified so contemporaneously with the original Constitution as to be considered a part of it.[19] Like the whole of the Bill of Rights, the Tenth Amendment was proposed by James Madison. 1 ANNALS OF CONGRESS 440-468 (1789).

From the words of Madison, proposing the amendments which later became the Bill of Rights, it is clear he considered the amendments necessary, though they did not change the essence of the Constitution. In language that would be echoed over a century later in *United States v. Darby*, 312 U.S. 100 (1941), Madison addressed the argument that the Bill of Rights is superfluous:

> "It has been said, that in the Federal Government [the Bill of Rights is] unnecessary, because the powers are enumerated, and it follows, that all that are not granted by the constitution are retained. . . ." 1 ANNALS OF CONGRESS 455 (1789).

But unlike the decision in *Darby*, Madison concluded that though this argument may have some force, it is not conclusive. In reasoning that foreshadows this Court's holding in *National League of Cities v. Usery*, 426 U.S. 833 (1976), Madison stated:

> "It is true, the powers of the General Government are circumscribed, they are directed to particular objects; but even if Government keeps within those limits, it has certain discretionary powers with respect to the means, which may admit of abuse to a certain extent . . . because in the constitution of the United States, there is a clause granting to Congress the power to make all laws which shall be necessary and proper for carrying into execution all the powers vested in the Government of the United

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[19] *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 67 (1872).

States. . . ." 1 ANNALS OF CONGRESS 455 (1789).

Madison reasoned that there may be laws which are enacted pursuant to an enumerated power which are "neither necessary nor proper." *Id.* Thus, the Bill of Rights, of which the Tenth Amendment is a part, would restrain the exercise of a delegated power in a means that trammeled the elemental assumptions of our Constitution. 1 ANNALS OF CONGRESS 454 (1789).

The Tenth Amendment should thus be looked upon with the same high dignity as the remainder of the Bill of Rights, as a statement of limitations on the exercise of delegated powers. The Tenth Amendment was ratified for a purpose, the purpose of placing specific limits on the means by which powers of the Federal Government are exercised. Thus, the States—the primary protectors of the peoples' life, liberty, and property—would not be engulfed.

This Court has rejected any construction that would diminish the Tenth Amendment. In *Fry v. United States*, 421 U.S. 542 (1975), this Court stated:

> "While the Tenth Amendment has been characterized as a 'truism,' stating merely that 'all is retained which has not been surrendered,' *United States v. Darby*, 312 U.S. 100, 124 (1941), it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." 421 U.S. 547, n.7.

Fry stands for the proposition that the Tenth Amendment does indeed have content and function within our Constitution.

More recently, this Court has found the Tenth Amend-

ment to embody the same kind of substantive limitation upon the exercise of Federal authority as do the other nine amendments in the Bill of Rights. In *National League of Cities v. Usery*, 426 U.S. 833 (1976), this Court found the plenary power of Congress under the Commerce Clause was limited by the specific restrictions contained in the Bill of Rights. The Tenth Amendment likewise embodies "definite limits upon the authority of Congress to regulate the activities of the States as States. . . ."[11] This limitation upon the power of the Federal government operates as a restraint upon the Federal judicial power as well as on the legislative. *Oregon v. Mitchell*, 400 U.S. 112, 207 (1970); *Younger v. Harris*, 401 U.S. 37, 44-45 (1971). The Tenth Amendment thus places substantive limits upon the powers of the Federal government to act in areas essential to the sovereignty of the States, and the determination of how State Supreme Court Justices are selected is such an area.

3. The Fourteenth Amendment did not change the structure of the Union.

The Fourteenth Amendment did not change the basic structure of the Union; it did not place State elections under Federal control, absent some form of discrimination. As this Court stated in *Snowden v. Hughes*, 321 U.S.

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[11] 426 U.S. at 842. *Hodel v. Surface Mining and Reclamation Association*, ___ U.S. ___, 101 S.Ct. ___, 69 L.Ed.2d 1 (1981), explains that *National League* has three requirements. First, the statute must regulate "States as States." Second, the statute must address matters indisputably "attributes of state sovereignty." And third, it must be apparent that State compliance with the law would directly impair its ability "to structure integral operations in areas of traditional functions." 69 L.Ed.2d at 23. The instant case clearly meets these three requirements. The federal intrusion into the selection of State Supreme Court Justices concerns an area peculiar to State sovereignty, impairing the ability to maintain power over local office.

1, 11 (1944), "[i]t was not intended by the Fourteenth Amendment and the Civil Rights Acts that all matters formerly within the exclusive cognizance of the states should become matters of national concern." This Court has consistently followed this position from the first cases considering the question, the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872) to the most recent, *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

The *Slaughter-House Cases* were the first cases to construe the Fourteenth Amendment after its passage. 83 U.S. (16 Wall.) at 67. To the Justices who decided those cases, the events and debates surrounding the passage of the Fourteenth Amendment were "almost too recent to be called history." 83 U.S. (16 Wall.) at 71. In those cases, this Court was called upon to determine whether monopolies granted by the State of Louisiana to maintain slaughterhouses violated the rights of non-monopoly butchers under the Civil War Amendments.

Reviewing cases prior to the Civil War, the Court concluded that regulation of animal processing was within the powers of the States, and thus the question became whether the Fourteenth Amendment somehow restricted that power. The Court asked whether the Fourteenth Amendment was intended to transfer from the States to the Federal government the power to protect the rights and liberties of the people. To this Court the answer was obvious; the effect of such a holding would be such an extreme departure from the structure of the Union as to admit of no doubt:

> "[T]hese consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by sub-

> jecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people; the argument [against such consequences] has a force that is irresistable. . . ." 83 U.S. (16 Wall.) at 78.

Thus, the Court reaffirmed the States as the primary protectors of the rights of the people.

The argument that the Due Process Clause changed this relationship was quickly dismissed as without any legal foundation. The Court concluded that the founders of this Country separated the powers of the national government from the State governments, and the Civil War Amendments did not destroy this structure. The function of these Amendments, the Court found, is to secure the civil rights of the former slaves.

Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874), follows the principles established in the *Slaugher-House Cases*. This line of cases culminated in *Snowden v. Hughes*, 321 U.S. 1 (1944), and was most recently reaffirmed in *City of Mobile v. Bolden*, 446 U.S. 55 (1980). We submit, therefore, that under our Federal system it is the province of the States to determine how their Supreme Court Justices are to be selected and whether they were selected properly. For the Federal courts to assume that authority is to arrogate a power essential to the continued sovereign existence of the States.

4. The power to select State Supreme Court Justices is essential to the continued sovereign existence of the States.

There are certain functions so essential to the sovereign

existence of the States as to preclude any Federal interference. *E.g., National League of Cities v. Usery*, 426 U.S. 833 (1976) (Congress cannot regulate the salaries of essential government employees); *Coyle v. Smith*, 221 U.S. 559 (1911) (Congress cannot tell a State where to locate its capitol). For a State to retain its sovereignty it must retain the power to determine how its Supreme Court is constituted.

Justice Story, in his COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, attested to the fundamental nature of the State's power to fill local offices:

> "What would be said of a clause introduced into the national constitution to regulate the state elections of the members of the state legislatures? It would be deemed a most unwarrantable transfer of power, indicating a premeditated design to destroy the state governments. It would be deemed so flagrant a violation of principle as to require no comment. It would be said, and justly, that the state governments ought to possess the power of self-existence and self-organization, independent of the pleasure of the national government."[12]

Under the original Constitution there was no question that States had the right, as an essential part of their sovereignty, to control the filling of local offices.

The first Supreme Court case to recognize an inherent limitation upon the Federal government to control State judicial offices is the landmark case of *Collector v. Day*, 78 U.S. (11 Wall.) 113 (1870).[13] In that case, this Court was called

[12] Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 284-85 (1st ed. 1833), *quoted in Oregon v. Mitchell*, 400 U.S. 112, 135 n. 17 (1970).

[13] *Helvering v. Gerhardt*, 304 U.S. 405 (1938), reaffirmed the narrow principle announced in *Collector* that the Constitution contains an implied limitation on the right of the Federal government to tax essential activities of the State, but overruled it on other grounds. *See Graves v. New York*, 306 U.S. 466 (1939).

npon to determine whether a Federal tax upon the salary of a State judicial officer is constitutional. Given the necessarily separate and independent condition of the States, this Court reasoned that the means to carry on the operation of government should be left free and unimpaired. One of these means is the "establishment of the judicial department and the appointment of officers to administer laws."[14] Holding that the taxing of State judicial office was unconstitutional as restricting the power of the State to establish and maintain its judiciary, this Court stated:

> "Without this power, and the exercise of it, we risk nothing in saying that no one of the States under the form of government guaranteed by the Constitution could long preserve its existence."[15]

Collector v. Day clearly stands for the proposition that the independence of State judicial office is essential to State sovereignty.

In *Taylor and Marshall v. Beckham* (No. 1), 178 U.S. 548 (1900), this Court was presented with a challenge to a State court resolution of a State election contest. Holding that the State procedure was adequate, this Court stated:

> "it is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their offices, the tenure of their offices, the manner of their election, and the grounds on which, the tribunals before which, and the mode in which, such elections may be contested, should be exclusive, and free from external interference, except as plainly provided by the Constitution of the United States." 178 U.S. at 570-71.

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[14] 78 U.S. (11 Wall) at 126.

[15] *Id.*

Taylor and Marshall simply found no federally protected right involved, plainly acknowledging the concept of State sovereignty and the necessity for States to maintain control over their offices. See also *Wilson v. North Carolina*, 169 U.S. 586 (1898) (contests over title to State offices are determined by State laws).

In Justice Frankfurter's concurrence in *Snowden v. Hughes*, 321 U.S. 1, 13 (1944), the theme is again reiterated:

> "All questions pertaining to the political arrangements of state governments are, no doubt, peculiarly outside the domain of federal authority. The disposition of state offices, the manner in which they should be filled and contests concerning them, are solely for state determination . . . ." 321 U.S. at 14-15.

Thus, Justice Frankfurter emphasized that the majority opinion in *Snowden* was grounded in the Court's concern for the Federal System.

This concern was again voiced in *Oregon v. Mitchell*, 400 U.S. 112 (1970), where Justice Black stated:

> "No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for State, county, and municipal offices and the nature of their own machinery for filling local public offices." 400 U.S. at 125.

In so stating, Justice Black reaffirmed an elemental judgment of this Court stretching from the inception of the Union. It is, in short, undeniable that the States must retain the right to fill their own offices, and determine their own challenges to the manner of their selection, if they are to retain their sovereignty and if our Federal system is to retain its vitality.

5. Federalism encourages and fosters individual rights and values that are fundamental to our culture and should, therefore, be given great weight.

Maintaining the sovereign and independent existence of the States through giving effect to the principle of Federalism furthers policies and values central to our culture. As Justice Black declared, Federalism "does not mean blind deference to States' rights."[16] Deference to the principle of Federalism fosters decentralization of government and the concomitant encouragement of local participation in and responsibility for governmental decisions. As Chief Justice Chase reminded us in *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1868), "[t]he people of each State compose a State." By seeking to promote the independence of that level of government closest to the people, we thus promote rights and values of the individual in society.

While numerous individual rights and values are promoted by the governmental decentralization resulting from giving effect to Federalism,[17] several are particularly appropriate to the case at bar. Deference to the concept of Federalism in allowing a State to retain its ability to determine how its Supreme Court is selected encourages self-determination by fragmenting governmental power into local units of a scale conducive to active participation by more citizens. Only local government can accustom people to responsibility and independence, and enabling them to participate at the local level encourages and fosters greater local responsibility for and participation in

[16] *Younger v. Harris*, 401 U.S. 37, 44 (1971).

[17] Stewart, "Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy," 86 YALE L.J. 1196, 1210-11 (1977); 5 INT. ENCY. OF THE SOC. SCI., "Federalism," Elazar 353 (1968).

the affairs of government.[18]

Justice Frankfurter voiced his concern for these themes in his dissent to *Screws v. United States*, 325 U.S. 91, 138 (1945). In that dissent, Justice Frankfurter expressed his concern for an expansive reading of the criminal counterpart to the 1871 Civil Rights Act, reading he felt would have the effect of centralizing in the Federal government certain law enforcement functions previously reposited in the States. This undue incursion by remote Federal authorities into local duties, Justice Frankfurter reasoned, debilitates local responsibility and removes from local authorities the hard choices and benefits of local decisionmaking.[19]

The principle of Federalism thus counsels deference to State sovereignty to give effect to those values which are central to the continued health of the democratic system. We submit that the people of the State, through their locally elected officials and through their duly constituted judicial system, should have the authority to determine whether Justices on their State Supreme Court are properly selected.

D. Section 1983 should not be construed so as to destroy the structure of the Union.

As established above, the Constitution is built upon the assumption of the dual sovereignty of State and Federal governments. The continued sovereignty of the States is dependent upon their ability to retain their power over

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[18] *Stewart, supra* note 17 at n. 62.

[19] 325 U.S. at 160-61.

the creation and filling of State offices. Section 1983 should not be construed so as to destroy this structure.[20]

The earliest cases to apply the principle of Federalism to an enactment of Congress in the civil rights area are the *Civil Rights Cases*, 109 U.S. 3 (1883). There this Court held sections one and two of the Civil Rights Act of 1866 unconstitutional as being directed toward individual action, not State action. The Court held that to allow an enactment of Congress to transgress areas of State authority—even one enacted pursuant to the enforcement clause of the Fourteenth Amendment—would be a violation of the Tenth Amendment.

This principle was applied by Justice Frankfurter, writing for the Court in *Stefanelli v. Minard*, 342 U.S. 117 (1951). In that case, the petitioner sought injunctive relief under § 1983 from the use of the fruits of an unlawful search by State officials. Speaking of the Civil Rights Act, Justice Frankfurter stated:

> "[T]he Court's lodestar of adjudication has been that the statute 'should be construed so as to respect the proper balance between the States and the federal government in law enforcement'. Only last term we reiterated our conviction that the Civil Rights Act 'was not to be used to centralize power so as to upset the federal system.' " 342 U.S. at 121 (citations omitted).

The Court thus denied the requested relief, reasoning that

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[20] See Tribe, "Unraveling *National League of Cities:* The New Federalism and Affirmative Rights to Essential Government Services," 90 HARV. L. REV. 1065, 1071 (1977):

> "If States are to have any real meaning, Congress must also be prevented from acting in ways that would leave a State formally intact but functionally a gutted shell."

See generally, "Developments in the Law: Section 1983 and Federalism," 90 HARV. L. REV. 1133 (1977).

to grant an injunction in such an instance would interject the Federal courts into an area of primary State concern.

Oregon v. Mitchell, 400 U.S. 112 (1970), indicates similar limits upon the scope of § 1983. *Oregon* states that there are at least three inherent limits on Congressional authority to enforce the Civil War Amendments and, by a parity of reasoning, upon the scope of § 1983. First, the power will not allow Congress to repeal other provisions of the Constitution. Second, the power was not intended to strip the States of their ability to govern themselves nor to convert the national government into a central government of unrestrained authority. Third, the power gives Congress the authority only to "enforce" the amendments by "appropriate legislation."[21] Section 1983 thus should not be so broadly interpreted so as to violate the inherent limits upon Congressional authority to enact such lesiglation.[22] We submit that to interpret § 1983 to give Federal authority over the determination of whether a State Supreme Court Judge is properly selected violates these limits.

In *National League of Cities v. Usery*, 426 U.S. 833 (1976), this Court struck down an act of Congress legislated upon plenary authority under the Commerce Clause, as violative of the affirmative limitation of Federalism. *National League of Cities* likewise suggests such a limitation to Congressional power under § 5 of the Fourteenth Amendment.

In *National League of Cities*, the question was whether the 1974 Fair Labor Standards Act amendments, extend-

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[21] 400 U.S. at 128.

[22] *Compare Griffin v. Breckenridge*, 403 U.S. 88 (1971) (42 U.S.C. § 1985(3) should be construed, to avoid conflict with principles of Federalism, to apply only to those conspiracies that involve race).

ing the act to cover certain public employees, violates any constitutional powers reserved to the States. This Court first found that, although the power of Congress under the Commerce Clause is plenary, an exercise of that power may not violate some affirmative constitutional limitation. The Tenth Amendment establishes such a limitation, preventing legislation which violates the sovereignty of the States.

Once this Court established that the Tenth Amendment is indeed a limitation upon Congressional authority in that it embodies the concept of dual sovereignty, the next question was whether the act somehow impaired any "functions essential to the separate and independent existence" of the States. 426 U.S. at 845.[23] The determination of how to compensate employees to carry out governmental functions is an essential attribute of State sovereignty, the Court reasoned, which Congress can not constitutionally override. The enforcement power, being less than plenary, likewise can not be the basis for violating State sovereignty.

This Court's recent decision in *Fair Assessment in Real Estate Association, Inc. v. McNary*, ____ U.S. ____, 102 S.Ct. ____, 70 L.Ed.2d 271 (1981), resolved a problem left unaddressed by the *National League of Cities* Court. *National League of Cities* specifically left open the question whether a different result would obtain in a confrontation between the principle of Federalism and an enactment under the enforcement section of the Fourteenth Amendment.[24] *Fair Assessment* held that § 1983, enacted

[23] *See also Hodel v. Surface Mining and Reclamation Association, supra* note 11.

[24] 426 U.S. at 852 n. 17; *cf. Fitzpatrick v. Bitzer*, 427 U.S. 445, 453 n. 9 (1976) (distinguishing *National League* as not involving an enactment under § 5 of the Fourteenth Amendment).

pursuant to § 5 of the Fourteenth Amendment, was limited by Federalism, even as an enactment pursuant to the plenary power of Congress under the Commerce Clause is limited.

In *Fair Assessment* this Court was presented with an action by county taxpayers for damages under § 1983 against a county for denial of equal protection or due process resulting from unequal taxation. Quoting from *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943), the Court reasoned that considerations of Federalism counseled restraint:

> "The scrupulous regard for the rightful independence of State governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it." 70 L.Ed.2d at 280 (quoting *Matthews v. Rodgers*, 284 U.S. 521, 525 (1932)).

Reasoning that the policy of restraint applies with equal force in damage actions, the *Fair Assessment* Court held that the State taxpayers must seek vindication of their claims in State court, "provided of course that those remedies are plain, adequate, and complete." 70 L.Ed.2d at 283.

We submit that the instant case is governed by the principles first announced in the *Civil Rights Cases* and later applied in *National League of Cities* and *Fair Assessment*. We do not argue that § 1983 is unconstitutional; however, we do argue that § 1983 should not be applied in a manner that brings it into conflict with the fundamental principles of our Constitution. By holding that § 1983 grants relief to State citizens who assert they have been denied the right to vote in a State election where State

officials have determined no election is required—absent any allegation of discrimination— is to use § 1983 in violation of the principles of dual sovereignty upon which the Constitution is founded. The plaintiffs have an adequate remedy for their claims in State court, and following *Fair Assessment*, that is where they must seek relief.[25]

II. Assuming due process to be required in this instance, the availability of a mandamus action in State court to compel Secretary of State Poythress to call an election satisfies the requirements of 42 U.S.C. § 1983 and the Fourteenth Amendment, pursuant to *Parratt v. Taylor*.

Parratt v. Taylor, 451 U.S. 527 (1981), holds that where a 42 U.S.C. § 1983 claim meets the three prerequisites for a due process violation—State action, a protected right, and a deprivation of that right—the requirements of the Fourteenth Amendment are still satisfied if State law provides a means to redress the asserted deprivation. It is beyond peradventure that the State courts of Georgia provide a full and adequate means for the plaintiffs to redress their asserted deprivation in an action in mandamus.[26] Indeed the plaintiffs have never contested the adequacy of their State remedy and the Court of Appeals specifically found that a fair and impartial trial of the issues can be had in the Georgia courts:

"The Georgia voters do not argue that they lack an

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[25] This argument is not in conflict with *Monroe v. Pape*, 365 U.S. 167 (1961). In *Monroe* the plaintiffs asserted a specific federally protected right under the Fourth Amendment.

[26] Ga. Code § 64-101 provides:

"All official duties should be faithfully performed; and whenever, from any cause, a defect of legal justice would ensue from a failure or improper performance, the writ of mandamus may issue to compel a due performance, if there shall be no other specific legal remedy for the legal rights."

> effective remedy in the Georgia courts, and it appears that they might be able to bring a mandamus action to force compliance with a law requiring public officials to call a special election. . . . [T]he voters have likewise avoided any claim that the courts of Georgia are unable to adjudicate impartially their claim of an illegal gubernatorial appointment to the Georgia Supreme Court. We likewise perceive and intimate no reason to doubt the fairness—either in fact or appearance—of adjudication of the case by the courts of Georgia." [C.A. 9a n.4] (citations omitted).[27]

Thus, given the availability of an adequate State remedy in this case, *Parratt* requires that due process be found satisfied.[28] But the Court of Appeals held that *Parratt* applies only to procedural due process violations, not to depriations of substantive due process as it found involved here. [C.A. 28a-29a].

Even if the right here concerned is protected by substantive due process—a position we specifically dispute—such a finding only recognizes a protected right that would

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[27] *See also, Thompson v. Talmadge*, 201 Ga. 867, 41 S.E.2d 883 (1947). *Thompson* is a case in which three men claimed to be the duly elected Governor of Georgia upon the death of Governor Eugene Talmadge. The Georgia Supreme Court resolved this complex and politically explosive confrontation without Federal intervention.

[28] Compare the instant case with *Kennard v. Morgan*, 92 U.S. (2 Otto) 480 (1875), a case remarkably similar to the one here presented. In that case, the Governor appointed Kennard as Associate Justice of the Supreme Court of Louisiana in place of Howe, who had resigned. One month later, the then acting Governor appointed Morgan to the same seat. The two claimants sought to settle the title to the office by resort to the Louisiana courts. The State courts, applying State law, found in favor of Morgan. The sole question for this Court was whether Louisiana deprived Kennard of his office without due process under the Fourteenth Amendment. Noting first that the contest related to the internal regulation of a State of its own officers, this Court found that the State procedures were sufficient to satisfy the requirements of due process, and thus no federal question was presented.

arise in any other instance from another source. *See, Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (property rights arise from independent sources such as State law). This finding of a protected right would not, as the Court of Appeals holding implies, render the protected right inviolable, but such a finding would trigger the safeguards of the Clause. As Justice Rehnquist stated, writing for the majority in *Parratt*, 451 U.S. at 537, the Fourteenth Amendment does not absolutely prevent the deprivation of rights, "[t]he Fourteenth Amendment protects only against deprivations 'without due process of law.' " *Quoting Baker v. McCollan*, 443 U.S. 137, 145 (1979). The finding of a right cognizable under the Due Process Clause would assure the aggrieved person a forum to vindicate that right--a requirement *Parratt* finds satisfied by the existence of adequate State remedies. Therefore, under the reasoning of *Parratt*, there is no foundation for distinguishing the outcome of the instant case because it is said to involve substantive, rather than procedural, due process.[11]

III. The district court should have abstained, pursuant to *Railroad Commission v. Pullman Co.*, pending resolution in State court of the question whether State law requires an election in this instance.

We contend below that, since a resolution of the State law question would obviate any potential constitutional issue presented by this case, the district court should have abstained under the doctrine of *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941). The district court disagreed, and the court of appeals affirmed that

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[11] *See also, Logan v. Zimmerman Brush Co.*, 50 U.S.L.W. 4247 (1982) (*Parratt* applies to random acts of State officers).

decision, holding that *Pullman* abstension was inappropriate for two reasons. First, the court held the State law question was clear and not susceptible to a limiting construction. [C.A. 14a-15a]. Second, the court found that the delay inherent in abstension made it unsuited for cases involving the right to vote. [C.A. 15a-17a]. A careful examination shows, however, that the instant case is precisely the type of case to which *Pullman* applies.

In *Pullman*, this Court announced the doctrine that when a Federal court is asked to enjoin State officers on constitutional grounds and the constitutional issue might be averted by a construction of unsettled State law, the court should stay its hand and allow the parties to seek a definitive resolution of the State issue in State court.[10] *Pullman* is grounded upon the policy against the unnecessary decision of constitutional issues and the policy of comity towards the States. 321 U.S. at 500.

The instant case falls squarely within the *Pullman* doctrine. The plaintiffs sought as their primary relief an injunction against State officials based upon an asserted deprivation of rights guaranteed by the Fourteenth Amendment. The constitutional issue hinges upon an unsettled issue of State law: whether the resignation of Justice Bowles requires a special election. The resolution of this State law question could have obviated the constitutional issue. A resolution of this issue by the State courts would be the most expeditious remedy available to the plaintiffs.

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[10] *See generally*, Wells, "The Role of Comity in the Law of Federal Courts," 60 N. CAR. L. REV. 59 (1981).

A. *Pullman* abstension applies where there is an unsettled, rather than an ambiguous, issue of State law.

The appellate court holds that *Pullman* applies only when the constitutional issue is intertwined with an "ambiguous" issue of State law, not merely one that is of first impression, as is the case here [C.A. 14a]. But this holding fails to take into account the policy upon which *Pullman* is based. The *Pullman* abstension rule is in part based upon the sound policy that the Federal courts should not engage in the unnecessary decision of constitutional issues.[21] The reason for this policy is readily apparent: the Federal courts under Article III of the Constitution are limited to deciding "cases" and "controversies;"[22] the unnecessary decision of constitutional issues may violate this limitation as being "advisory" in nature.

The fact that an issue of State law is merely unsettled does not make its resolution by a Federal court any less advisory than does resolution of an ambiguous issue. In either instance, a resolution of the issue by a controlling decision by a State court would supplant the Federal court's opinion. 321 U.S. at 500. Thus, *Pullman* abstension applies to unsettled, not just ambiguous, issues of State law. The State law question in the instant case, being one of first impression, presents a particularly apt situation for *Pullman* abstension.

B. Even assuming that *Pullman* applies only to ambiguous issues of State law, the State law question is at least ambiguous.

The appellate court held that Justice Bowles' letter of

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[21] *Id.* at n. 23.

[22] *See Flast v. Cohen*, 392 U.S. 83 (1968).

November 20, 1980,[33] triggered a special election under Georgia law.[34] While the appellate court found the meaning of the statute plain and the result of this letter clear [C.A. 29a-37a], the Georgia law is susceptible to several limiting constructions that would have obviated the constitutional issue. First, it is arguable under Georgia law that an officer cannot resign a term he does not have. Since Justice Bowles' resignation was made during his term ending December 31, 1980, it could not affect his term beginning January 1, 1981. Second, Georgia law recognizes a distinction between "withdrawal" and "resignation." The Georgia law requires a "withdrawal" to trigger the special election statute; Justice Bowles' "resignation" is thus insufficient to trigger the requirement for a special election. Third, a resignation must be directed to the Secretary of State, not the Governor, to be effective. And fourth, even if Justice Bowles' resignation was effective, under Georgia law, it could be and was rescinded. These limiting constructions are briefly discussed below.

1. One cannot resign a term one does not yet have.

At common law[35] an officer is unable to resign an

[33] Pl. Ex. A; R. 185, 188.

[34] Ga. Code § 34-1514 states in pertinent part:

"[W]henever any person elected to public office shall die or withdraw prior to taking public office, then the authority, with whom the candidates for such nomination or office filed their notice of candidacy, shall thereupon call a special primary or election to fill such position."

This law and its forerunners [Ga. Laws 1962, Ex. Sess., pp. 26, 175; 1979, pp. 292, 307] enacted the common law rule. *See, Crovatt v. Mason*, 101 Ga. 246, 28 S.E. 891 (1897); *Hardwick v. Swearingen*, 12 Ga. 23 (1852).

[35] Since Ga. Code § 34-1514 adopted the common law rule, *supra* n. 34, it must be interpreted with reference to the common law. *Chastain v. Johns*, 120 Ga. 977, 48 S.E. 343 (1904); *White v. Ross*, 40 Ga. 339 (1869). The common law may be established by reference to decisions of Georgia courts as well as those of other jurisdictions.

office before he has entered into possession of it.[36] This rule prevents improper control by the appointing official over an appointee after the appointment has been made.[37] The common law rule was adopted without compromise by the Georgia Supreme Court in *Partain v. Maddox*, 227 Ga. 623, 182 S.E.2d 450 (1971). Under Georgia law, Justice Bowles could thus not have resigned on November 20, 1980, an office which he did not enter until January 1, 1981.

2. A resignation is not sufficient to trigger the special election statute.

Georgia Code § 34-1514 requires that one "withdraw prior to taking office" before a special election to fill the position is necessary. There is a distinction in Georgia law between "resignation" and "withdrawal." *Compare* Ga. Code § 89-501(2) *with* Ga. Code §34-1514.[38] Justice Bowles' letter of November 20 states on its face that it is a resignation. Furthermore, Justice Bowles testified that he intended the letter to be a resignation from the commission he then held, not a withdrawal from the term to which he had been elected and for which he had received no commission. [R. 314].

3. A resignation to the Governor is not sufficient to trigger the special election statute.

As a matter of law, the resignation of Justice Bowles

Sinclair v. Friedlander, 197 Ga. 797, 30 S.E.2d 398 (1944); *Bush & Hattaway v. McCarty*, 127 Ga. 308, 56 S.E. 452 (1907).

[36] *See, e.g., Miller v. Sacramento County*, 25 Cal. 93 (1864).

[37] *Dibelka v. Reinberg*, 263 Ill. 536, 105 N.E. 715 (1914).

[38] For the applicable portion of Ga. Code § 34-1514 see note 34, *supra*. Ga. Code § 89-501(2) provides:

"All offices in the State shall be vacated—

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2. By resignation, when accepted."

cannot function as a withdrawal to trigger the special election statute since it was not directed to the proper authority. In *Edwards v. United States*, 103 U.S. 471 (1880), this Court held that the common law requires a resignation, to be of any effect, to be directed to and be accepted by the officer empowered to fill the vacancy or to call an election to fill the vacancy. This rule has been adopted by Georgia,[39] and by analogy applies to withdrawals: it would be absured to suggest that a withdrawal by a public official to *anyone* would be sufficient to trigger a special election. Georgia Code § 34-1514 must be read to require the withdrawal to be made to "the authority, with whom the candidates for such nomination or office filed their notice of candidacy"—in this case, the Secretary of State. Otherwise there would be terrible confusion, as there is here, as to whether a public official was duly appointed or whether there must be a special election. Since Justice Bowles' resignation was directed to the Governor, as a matter of law it cannot function as a withdrawal to trigger a special election.

4. By taking the oath of office and entering upon the duties of his new term, Justice Bowles rescinded any resignation.

Even if the letter of November 20, 1980, should be construed as a withdrawal from the term beginning January 1, 1981, that withdrawal could be rescinded. The events show that even if it is found that Justice Bowles intended to withdraw from the term beginning January 1, 1981, he clearly rescinded that withdrawal by taking the oath of office on December 15, 1980, and by entering into the duties of that office on January 1, 1981. [C.A. 59a; R. 71-

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[39] See Ga. Code § 89-501(2).

72]. Furthermore, the events show that, even if the letter should be deemed a withdrawal, Secretary of State Poythress agreed to Justice Bowles' rescision of his withdrawal by not calling a special election.

A rescision of a withdrawal must be allowed because Georgia law does not provide to the contrary. Georgia law jealously guards the rights of its citizens to hold public office.[40] Since there is no specific prohibition against rescinding a withdrawal from public office, such a rescision must be allowed by Georgia law.

In support of this analysis of Georgia law is a large body of common law which permits the withdrawal of resignations.[41] The general rule that a resignation may be withdrawn applies by analogy to the present case. It is clear from Justice Bowles' actions that he rescinded whatever withdrawal he made. It is undisputed that Justice Bowles took the oath and entered upon the duties of his new term; these acts show that as a matter of law he rescinded any earlier withdrawal he may be said to have made. And significantly, no special election was called by the Secretary of State, thus, any withdrawal by Justice Bowles was not accepted as such and could have been rescinded.

C. Any delay that may have occurred through invoking the doctrine of abstension would not operate to deprive any fundamental rights.

The Court of Appeals found that the instant case is inappropriate for *Pullman* abstension because the delay involved would operate to deprive fundamental rights.

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[40] *Patten v. Miller*, 190 Ga. 123, 8 S.E.2d 757 (1940).

[41] *E.g., Armistead v. State Personnel Board*, 149 Cal.Rptr. 1, 22 Cal.3d 198, 583 P.2d 744 (S.Ct. 1978) (*en banc*).

Relying primarily on this Court's decision in *Harman v. Forssenius*, 380 U.S. 528 (1965), the appellate court held that the district court had not abused its discretion to determine, without delay, whether there had been a denial of a fundamental right in this case. [C.A. 16a-17a]. We argue that a suit in State court would have been the most expeditious method for resolving this controversy, and furthermore, the reasoning of *Harman* is not applicable.

The critical facts in *Harman* are that there the district court was presented with a motion for a stay just two months prior to the deadline for meeting certain statutory requirements and just eight months before the 1964 general election. From these facts, the *Harman* Court reasoned:

> "Given the importance and the immediacy of the problem, and the delay inherent in referring questions of state law to state tribunals, it is evident that the District Court did not abuse its discretion in refusing to abstain." 380 U.S. at 537.

But there is no similar "immediacy" that prevents abstension in this case; a special election, by its very nature, can be held at any time, and if the Georgia Supreme Court holds that a special election is required, one would be held forthwith. Therefore, we submit the appellate court erred in finding no abuse of discretion in the district court for failing to apply the *Pullman* doctrine.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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Respondent's Brief

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QUESTIONS PRESENTED

I. Whether the failure to call a special election to select a successor to a Georgia Supreme Court justice, in derogation of a Georgia statute requiring an election, is a deprivation of voting rights and a violation of due process of law supporting an action under 42 U.S.C. §1983.

II. Whether voters who are deprived of an election and thus their right to vote in violation of the due process guarantee of the Fourteenth Amendment are required first to pursue possible remedies in state court before petitioning the federal court under 42 U.S.C. §1983.

QUESTIONS PRESENTED (Continued)

III. Whether the district court and circuit court abused their discretion in refusing to abstain where the state law is so clear that there is no likelihood of avoiding constitutional questions, especially where fundamental constitutional rights enjoyed by a broad class of citizens are totally denied.

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Chisholm v. Georgia, 2 U.S. (2 Dall.), (1793) 105

Communist Party of Indiana v. Whitcomb, 414 U.S. 441 (1974) .12,29

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Fair Assessment in Real Estate, Inc. v. McNary, ___ U.S. ____ 102 S. Ct. 177 (1981) 80,82

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Gamza v. Aguirre, 618 F2d 449 (5th Cir. 1980) 39,43

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Gray v. Sanders, 327 U.S. 368 (1963) 16,39,69

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Whitney v. California, 274 U.S. 357 (1927) 27,35

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Williams v. Rhodes, 393 U.S. 23 (1968) 28,29,30,33,40,44,71

Williams v. Scalfani, 444 F.Supp. 906 (1978) 63

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Zwickler v. Koota, 389 U.S. 241 (1967) 93,100

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MISCELLANEOUS:

Burton, Legal Thesaurus, Red. Ed. (1980) 90

Georgia Official and Statistical Register 1953 - 1980 99

Meiklejohn, The First Amendment Is an Absolute, in Free Speech and Association, The Supreme Court and the First Amendment (P. Kurland ed. 1975) 25

Op. Att'y Gen. Ga., U74-29, U75-2, 76-56, 78-60, U78-44 91,92

Schaeffer & Koop, Whatever Happened to the Human Race? (1979) . . 101

Tribe, American Constitutional Law (1978) 25

Webster's New Collegiate Dictionary (1961) 90

NO. 81-1055

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

DAVID B. POYTHRESS, et al.,
Petitioners,

v.

ELIZABETH B. DUNCAN, ELIZABETH N. STOUT and KATHLEEN KESSLER, Ordinary Citizens,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT, UNIT B,
NOW THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENTS DUNCAN AND STOUT

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the Constitutional and statutory provisions cited by Petitioners, Respondents include the First Amendment of the United States Constitution:

"Congress shall make no law... abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

This Court need go no further than page 5 of Petitioners' Brief to get to the crux of how Respondents' constitutionally protected right to vote was denied when a special election was not called.

In two short sentences Petitioners have said it all. At the center of page 5:

> "Justice Bowles responded that <u>he did not intend</u> to withdraw from the term to which he had been elected and that he intended to take the oath of office and enter into the duties of his new term."

At the asterisk on the bottom of page 5:

"This speedy appointment was made possible by Justice Bowles' November 20th letter, which was intended to and had the effect of initiating the judicial nominating process."

The illogic of resigning from a term, but not an office, is a contrivance pure and simple. Petitioners desired and assured by their actions that the Judicial Nominating Commission (JNC) would submit recommendations to replace Justice Bowles. These same actions triggered the requirement for a special election which was ignored by Petitioners.

Respondents respectfully refer this Court to the full statement of the facts of the District Court, Petitioners' Certiorari Appendix, pp. 51a-61a, (hereinafter referred to as "C.A.") which was so significant to the understanding of the issues that the Fifth Circuit included it as an appendix to its decision [C.A. 38a-45a].

The facts as found show a long-standing desire to arrange a gubernatorial appointment for the successor of Georgia Supreme Court Justice Jesse G. Bowles by Governor George D. Busbee.

Petitioner Bowles resigned his position on the Georgia Supreme Court on November 20, 1980, "With deep regret," just 16 days after he was elected to a new six-year term, to be "effective December 31, 1980". [J.A. 23]. The timing of Petitioner Bowles' resignation had been planned so that the JNC could consider the nomination of a replacement for Petitioner Bowles at the same time it was considering candidates for an existing vacancy on the Georgia Court of Appeals. The JNC had scheduled a meeting to consider the Court of Appeals vacancy on December 12 and 13 of 1980. In order to distribute the notices of Petitioner Bowles' vacancy in

time to consider candidates at that meeting they had to receive word of the vacancy by November 20. Coordination between Petitioner Bowles and the JNC was done by Charles Tidwell, Petitioner Busbee's Executive Counsel.

The prelude to this resignation began as early as October of 1979 when Petitioner Bowles discussed with Petitioner Busbee that he might resign from the Court. In August of 1980, after winning the Democratic primary to become the nominee to succeed himself, Petitioner Bowles met with Tidwell to discuss how Petitioner Bowles' successor would be chosen if he resigned then. Tidwell told him that the Party would select a replacement nominee and that the "...Governor would have some influence in the selection process, but would not be able to control it." [C.A. 54a]. In September 1980, Petitioner Bow-

les informed Tidwell that he intended to resign. Petitioner Bowles, Tidwell, and Petitioner Busbee then met on September 24, 1980, to discuss Petitioner Bowles' resignation. Various resignation dates were discussed at that meeting with none of the parties being aware of the provision of Georgia law requiring a special election when an elected official withdraws after their election but before taking office, Ga. Code Ann. § 34-1514. [C.A. 38a - 39a]

Petitioner Bowles' resignation was accepted by Petitioner Busbee on November 21 (with words of highest praise and farewell, [J.A. 25]). After news reports of the resignation raised the issue of special election [J.A. 24], Petitioner Busbee and Tidwell met on November 24 to discuss Petitioner Bowles' resignation and, for the first time, the statutory require-

ment of a special election. [R. 179 line 20 - 180 line 2]. At that time they did not favor a special election due to the expense and the possibility of a low turnout. By letter of December 3, 1980, Respondents made a specific request to Petitioner Poythress to call a special election [J.A. 28]. At a press conference on December 4, Petitioner Busbee said he would not favor a special election because of the expense and an expected low turnout. [J.A. 57-58].

The official explanation of how Petitioners Busbee and Bowles could comply with the special election statute and still make an appointment is contained in the December 5, letter of Charles Tidwell to Secretary of State Poythress [J.A. 29-30]: Justice Bowles, Tidwell explains, was only resigning from his current term, but he intended to take the oath and serve the

new term. On December 9, 1980, without respondents having any knowledge of the substance of the Tidwell letter of December 5, Petitioner Poythress was again requested in writing to call a special election. [J.A. 31]. On December 15, Respondents had a personal conversation with Petitioner Poythress, at which time he provided Respondents with his letter [J.A. 32] and a copy of the Tidwell letter. Petitioner Poythress stated that Petitioner Bowles intended to take the oath and serve as an Associate Justice and there was no basis for the call of a special election.

In fact, on December 15, Petitioner Bowles took the oath of office for his term to which he had been elected on November 4. The next day, December 16, 1980, Tidwell picked up the list of JNC nominees from which Petitioner Busbee would select the successor to Petitioner Bowles [R.

173, lines 2-7], and on December 18, 1980 Petitioner Busbee interviewed Petitioner Gregory, one of the recommendees of the JNC [R. 173, line 16, 174, line 5]. The work of the JNC was never stopped, even after the oath-taking.

On January 5, 1981, the first business day of the year, Justice Bowles, from the offices of the Court, telephoned Petitioner Gregory and discussed Gregory's appointment and staff and parking space transition. [C.A. 60a]. Thereafter, at approximately noon on that date, Petitioner Bowles submitted a second resignation [J.A. 34], which was accepted immediately by Petitioner Busbee. [J.A. 35]. On January 8, 1981, Petitioner Busbee apointed Hardy Gregory, Jr., to fill Bowles' position. As set forth in Petitioners' brief at the asterisk on page 5, the speedy appointment of Petitioner Gregory was made

possible by Petitioner Bowles' November 20, resignation. Throughout this time the Petitioners after being made aware of the requirement of a special election under Georgia law, proceeded as if no vacancy existed for purposes of that statute, but proceeded as if a vacancy did exist for the purposes of an appointment by the Governor for Bowles' successor.

The District Court found the facts required the calling of a special election and the failure of the Petitioners to call the election deprived Respondents of their Constitutionally protected right to vote. [C.A. 76a].

SUMMARY OF ARGUMENT

The right to vote is ULTIMATELY DENIED if no election is held. Respondents' franchise was robbed when Petitioners perpetrated a hoax to prevent the calling of

a special election. Petitioners attempt to shield their conduct from view by describing the issues in this appeal as mere problems of election administration, and as problems of methods of selection for the appellate judiciary in Georgia. Petitioners conveniently ignore the fact that the method of selecting appellate judges was settled by the people through the Georgia legislature years ago. That question is not, and would not properly be before this Court. Petitioners assertions of issues of administration are contradicted by the facts. No election has been called; there is nothing to administer.

The issue which is actually before this Court for resolution is whether the deliberate denial of the right to vote, by failing to call a special election to elect a constitutional officer, consti-

tutes an injury protected by the United States Constitution.

I.

The liberty interests protected by the First Amendment are secured against state infringment by the guarantees of the Fourteenth Amendment. Palko v. Connecticut, 302 U.S. 319 (1937). One of these liberty interests is the right to have an election in which citizens have the opportunity to cast an effective ballot. This right rests on the Constitutional protections of speech and association. Buckley v. Valeo, 424 U.S. 1 (1976). The states have been specifically prohibited from infringing these First Amendment rights in instances of access to the ballot in state election cases, such as is presently before the Court. Communist Party of Indiana v. Whitcomb, 414 U.S. 441 (1974).

When Petitioner Bowles resigned from the Georgia Supreme Court on November 20, 1980, he set in motion a process which should have resulted in a special election being called to select his successor, according to Ga. Code Ann. §34-1514. However, through a series of manuevers, described by the District Court as "neither logical nor ... credible" [C.A. 74a], Petitioner Busbee personally appointed the successor. Respondents show the failure to call the special election in which they could exercise the franchise deprived them of the due process protections of the Fourteenth Amendment.

As a protection for substantive First Amendment liberty interests, due process represents a profound attitude of fairness between individual and government. Petitioners deprived Respondents of an election to which they were entitled under

state law, thereby depriving Respondents of an opportunity to vote. The manner in which that was done offends the attitude of fairness embodied in the due process clause and constitutes a constitutional deprivation. This deprivation supports a cause of action under 42 U.S.C. 1983 on which Respondents have been granted relief.

To avoid Respondents claim, Petitioners rely on the inapposite authority of Snowden v. Hughes, 321 U.S. 1 (1944). Such reliance is misplaced because:

(1) Subsequent Supreme Court decisions limit Snowden, especially Lubin v. Panish, 415 U.S. 709 (1974), which allows First Amendment protection to candidates' rights.

(2) Snowden's treatment of due process (one sentence) is further diminished by cases before and after Snowden allowing

due process challenges to candidates' and voters' rights under state laws.

(3) Snowden had before it a claim to protect property rights under state law. Any violation there, however, does not compare to the seriousness of the deliberate deprivation of the liberty interests of Respondents and 3,000,000 voters in Georgia, "a fundamental breakdown of the democratic system." [C.A. 28a].

Finally, since Snowden's ruling was only that the complaint was insufficient in factual content, its precedent value can, and safely should, be limited to that ruling.

The Petitioners' reliance on the Tenth Amendment to shield conduct which "is at best contrived" [C.A. 61a] is empty. There will be no insulation from federal judicial review, "when state power is used as an instrument for circumventing a fed-

erally protected right." Gray v. Sanders, 372 U.S. 368, 381 (1963).

II.

Parratt v. Taylor, 415 U.S. 527 (1981) specifically does not deal with the substantive aspects of the due process clause and does not preclude Respondents' cause of action. Parratt simply held that when adequate state remedies are present for redress of a deprivation of property there is no constitutional deprivation.

The injury to Respondents was caused by the manner in which Respondents were deprived of the right to vote. No amount of state procedures or post-deprivation hearings would eliminate the fact of the constitutional deprivation.

Since Parratt does not apply here, the question of whether Respondents had a state court remedy is irrelevant. The specific remedy of mandamus urged by Peti-

titioners was not in fact available to Respondents, as determined by the District Court, ".. due to Justice Bowles' taking the oath of office for the new term and Justice Gregory's appointment on January 6, 1981." [C.A. 63a].

Even if there is some state remedy available to Respondents, and they continue to deny its existence, Respondents would not be required to exhaust it. The nonexhaustion principle of Monroe v. Pape, 365 U.S. 167 (1961) has endured for two decades, and without question applies to the Constitutional injury asserted by Respondents.

III.

The words of Ga. Code Ann. §34-1514 are clear, simple, and easily definable. The opinions of the Georgia Attorney General reflect this simplicity. The opinions of the District Court and Court of

Appeals implement this clarity. The Respondents are unable to demonstrate that a federal judge cannot understand and apply the statute because to do so the judge would only be "groping utterly in the dark," Burford v. Sun Oil Co., 319 U.S. 315, 338 (1943) (Frankfurter, J. dissenting). Therefore, Petitioners urge several "limiting constructions" upon the Court. These suggested ambiguities were dismissed out of hand by the Court of Appeals as "creative arguments by the Georgia officials." [C.A. 14a].

Abstention is not a doctrine which was crafted to allow the state courts to explore for possible problems, such as the ones mentioned by Petitioners. That would convert abstention "from an exception into a general rule." Examining Board v. Flores De Otero, 426 U.S. 572, 598 (1976). Rather, abstention was crafted to imple-

ment a concept of "Our Federalism" well articulated by Justice Black, to show due respect for the LEGITIMATE interests and activities of the states. Younger v. Harris, 401 U.S. 37, 44 (1971). The Petitioners unlawfully eliminated Respondents' basic right to vote when they failed to call a special election. This caused "a fundamental breakdown of the democratic system" in Georgia. [C.A. 28a]. Petitioners cannot show any LEGITIMATE justification. Their conduct was deliberate. To abstain in this case would be to deny the obligation of the federal judiciary to excercise its jurisdiction except in extraordinary circumstances and under narrow exceptions. County of Alleghany v. Frank Mashuda Co., 360 U.S. 180, 188-89 (1959).

I. RESPONDENTS' CONSTITUTIONAL RIGHT TO VOTE, PROTECTED BY THE FOURTEENTH AMENDMENT, WAS DENIED WHEN PETITIONERS REFUSED TO CALL A SPECIAL ELECTION REQUIRED BY STATE LAW, THEREBY CREATING A CAUSE OF ACTION PURSUANT TO 42 U.S.C. 1983.

A. THE CONSTITUTION OF THE UNITED STATES ESTABLISHES CLEAR PROTECTION OF THE RIGHT TO VOTE.

The Constitution of the United States protects the right to vote against denial by the total failure to call a special election for the election of a state officer. Such an injury is precisely the basis of relief for Respondents in the holdings of the District Court and the Court of Appeals.

The right to have an election in which to vote is not provided in the body

of the Constitution itself, nor is it protected specifically by name in any of the Amendments to the Constitution. But this right, embodied in the First Amendment, is protected against infringement by the states through the Fourteenth Amendment.

Respondents, of course, are hesitant to even remind this Court of the history of the development of the protection of this right and the incorporation by the Fourteenth Amendment of First Amendment liberties. However, Petitioners suggest in their brief that this Court make unprecendented interpretations to undermine the Consititutional and statutory provisions which secure to the citizens of this country those very rights and liberties which make our form of government unique in the history of the the world. In view of this position, and considering that it is asserted by the Attorney General of the

State of Georgia, Respondents are compelled to firmly establish the Constitutional basis for the right they seek protected, by tracing its development here.

The right to have an election in which to vote is unquestionably protected by numerous authorities in many contexts. These instances of voting protection may be broadly grouped into equality oriented participation, and free participation oriented cases, such as the case at bar. We will briefly look at this distinction, and then proceed to demonstrate the specific Constitutional protections provided for the rights asserted by Respondents.

1. EQUALITY ORIENTED PARTICIPATION

The enactment of the Fourteenth and Fifteenth Amendments subsequent to the Civil War has given rise to a body of civil rights litigation establishing that denial of access to the ballot to certain

classes of citizens is protected by the Federal Constitution. The Fifteenth Amendment ban on racial barriers to voting authorized this Court to remove a state placed imposition of a literacy test for voting in Guinn v. United States, 238 U.S. 347 (1915).

The jurisdiction and authority of the Federal courts to provide relief for citizens deprived of the right to vote in state elections on the basis of equal participation is clear. The landmark reapportionment decisions have forcefully asserted Constitutional protection for the opportunity to exercise the franchise:

> "Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as federal elections." Reynolds v. Sims, 377 U.S. 533, 554 (1964).
>
> "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the

most basic, are illusory if the right to vote is undermined." Wesberry v. Sanders, 376 U.S. 1, 17 (1964).

The Fourteenth Amendment has also been recognized as the source of protection for access to the ballot box for reasons other than race such as; (1) durational citizenship requirements and wealth-based requirements, e.g. Dunn v. Blumstein, 405 U.S. 330 (1972), Harper v. Virginia State Board, 383 U.S. 669 (1966), and Oregon v. Mitchell, 400 U.S. 112 (1970); and (2) denial of access to non property owners or military personnel, e.g. Carrington v. Rash, 386 U.S. 89 (1965) and Kramer v. Union Free School District, 395 U.S. 621 (1969).

2. FREE PARTICIPATION-ORIENTED CASES

Protection of the right to vote in the form of an opportunity to freely participate in government through access to

the ballot developed parallel to the equal participation or equality oriented cases.

> "At their core, all voting-related rights are rights to participate in this [election] process, and the import of the process for our system of government freights them with their indisputable moment." L. Tribe, American Constitutional Law, 737 (1978).

Participation through the ballot is of overwhelming importance:

> "The freedom to 'vote,' the official expression of a self-governing man's judgment on issues of public policy, must be absolutely protected." A. Meiklejohn, The First Amendment Is an Absolute, in Free Speech and Association, The Supreme Court and the First Amendment, 12 (P. Kurland ed. 1975).

Free participation protection rests principally upon the First Amendment freedoms of speech and association which are applied to the states through the due process clause of the Fourteenth Amendment. The right to vote is exactly the kind of liberty of which Justice Cardozo spoke in Palko v. Connecticut, 302 U.S. 319 (1937)

which is necessary to preserve our "scheme of ordered liberty." Id. at 325.

First Amendment guarantees are recognized as unique and fundamental. As such they were in the forefront of the development of the incorporation of Consitutional guarantees protected against state action. Gitlow v. New York, 268 U.S. 652, 666 (1925). Justice Cardozo expressed it well:

> If the Fourteenth Amendment has absorbed them [the federal bill of rights], the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed. Twining v. New Jersey, supra (211 U.S. p. 99, 53 L.ed. 106, 29 S. Ct. 14). This is true, for illustration, of freedom of thought and speech. Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom. Palko, 302 U.S. at 326-27.

Justice Brandeis also spoke straightforwardly of the protection of First Amendment rights through the Fourteenth Amend-

ment, referring to them as "fundamental rights" when he said:

> "It is settled that the due process clause of the 14th Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term "liberty"are protected by the Federal Constitution from invasion by the states. The right of free speech, the right to teach and the right of assembly are, of course, fundamental rights. These may not be denied or abridged. Whitney v. California, 274 U.S. 357, 373 (1927), (Brandeis, J., concurring).

The protection due First Amendment rights does not vary and is not dependent on whether the infringement is the result of Federal or state action. Benton v. Maryland, 395 U.S. 784, 795 (1969).

3. THE RIGHT TO VOTE IS ONLY A PART OF THE CONSTITUTIONAL PROTECTION GIVEN TO FREE PARTICIPATION, POLITICAL EXPRESSION AND ASSOCIATION.

The right to associate to advance political beliefs is a First Amendment

right which has been undeniably protected by this Court. NAACP v. Alabama, 357 U.S. 449 (1958) and Buckley v. Valeo, 424 U.S. 1 (1976).

This Court has recently found that political expression in the form of financial contributions is a form of expression protected by the First Amendment against infringement by the states. First National Bank v. Bellotti, 435 U.S. 765 (1978).

It cannot be disputed that the right sought to be protected here, to have an election in which Respondents may vote, is protected by the Federal Constitition, and that the Federal Courts may properly enforce these protections. In Williams v. Rhodes, 393 U.S. 23 (1968), a state statute was challenged which restricted the ability of new political parties to be placed on state election ballots. Justice Black wrote for the Court emphasizing the

importance of the right to vote as a First Amendment guarantee:

> In the present situation, the state laws place burdens on two different, although overlapping kinds of rights --the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms." Id. at 30-31.

Petitioners assert that their actions are a permissible restriction of Respondents right to vote based upon their interpretation of state law. The argument that federal courts lack authority to prohibit state restriction of the exercise of First Amendment freedoms "in cases of state regulation of access to the ballot" was rejected where "appellants' interests as party members in casting an effective ballot" were at stake. Communist Party v. Whitcomb, 414 U.S. 441, (1974). In Whitcomb the Court stated:

> "We perceive no reason to make an exception, and appellees suggest none. Indeed, all of the reasons for application of the principles in the other contexts are equally applicable here. To be sure, administration of the electoral process is a matter that the Constitution largely entrusts to the States. But, in exercising their powers of supervision over elections and in setting qualifications for voters, the States may not infringe upon basic Constitutional protections." Kusper v. Pontikes, 414 U.S. 51 (1973). Id. at 449.

(On the issue of state administration of its own laws so as not to restrict or encumber the enjoyment of Constitutional rights this Court in Williams, 393 U.S. at 29 and Oregon v. Mitchell, 400 U.S. 112 (1970) specifically supports the position taken in Whitcomb.)

4. THE RIGHT TO VOTE IN STATE ELECTIONS IS SPECIFICALLY PROTECTED

Federal courts have the duty and the authority to protect the right of citizens to vote under both free participation and equality concepts against state infringe-

ment. The authorities outlining that protection have never treated these rights differently because they arouse in other than a normal legislative or executive election. Bellotti, 435 U.S 765 (1978), Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952). In Avery v. Midland County, 390 U.S. 474 (1968), Constitutional standards were required for the election of commissioners to the county Commissioners Court, and in Hadley v. Junior College Dist., 397 U.S. 50 (1970), they were required in the election of trustees for the junior college.

The present appeal presents an example of complete seizure of power for the selection of a state Supreme Court justice, in violation of the requirement for an election. Our state constitution requires Georgia Supreme Court justices to be elected. Ga. Const. art. VI, sec. II,

para. III (Ga. Code Ann. § 2-3103). After a justice is in office, and he then resigns, this same constitutional provision says the governor may appoint his replacement until the next general election.

The Georgia law on special elections implements this constitutional clause by explaining the procedure to follow after the candidate is elected but before he takes office, and in this period becomes unwilling or unable to serve. Ga. Code Ann. § 34-1514. (And precisely the situation which gave rise to this action.)

This provision is important to carrying out the constitutional objective because it adheres strictly to the constitution in requiring an elected official to take office, not just get elected. Roan v. Rogers, 201 Ga. 696 (1946).

It was this special election statute which Petitioners Busbee and Bowles ar-

ranged to avoid. The result was that they usurped the power of the people to elect their justices. Their actions violate and frustrate the special election statute and the Georgia constitutional requirement for elected justices to take the office.

It is at this point, where state law provides for an election, that the Constitution of the United States protects the right of Respondents, and all voters in Georgia, to have that election called, so they may exercise the franchise. This right, the calling of a required election, so that Respondents may "cast their votes effectively," (Williams, 393 U.S. at 30) is at the root of the free participation oriented cases reviewed here. It is upon this base that the District Court framed its conclusion that Respondents' Constitutional rights had been violated. [C.A. 66a-67A].

B. THE DEPRIVATION OF RESPONDENTS' CONSTITUTIONALLY PROTECTED RIGHT TO VOTE, IN VIOLATION OF THE FOURTEENTH AMENDMENT, ESTABLISHED THEIR CAUSE OF ACTION PURSUANT TO 42 U.S.C. 1983.

1. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT PROTECTS AGAINST THE UNLAWFUL ELIMINATION BY PETITIONERS OF THE ELECTION IN WHICH RESPONDENTS AND ALL GEORGIA VOTERS COULD EXERCISE THE FRANCHISE.

a. DUE PROCESS OF LAW IS A FORM OF PROTECTION OFFERED BY THE FOURTEENTH AMENDMENT TO CONSTITUTIONALLY PROTECTED RIGHTS.

We can look to a number of respected authorities to find a working definition of due process of law which should have been respected by Petitioners. As Justice Brandeis stated, due process applies "to matters of substantive law as well as to

matters of procedure." Whitney, 274 U.S. at 373 (Brandeis, J. concurring). In Rochin v. California, 342 U.S. 165 (1952), this Court referred to due process of law as:

> "...a summarized constitutional guarantee of respect for those personal immunities which are so rooted in tradition and conscience of the nation as to be ranked as fundamental or are implicit in the concept of ordered liberty." Id. at 169.

Justice Frankfurter observed that this Court has in the past had to act to check "attempts of executives, legislatures, and lower courts to disregard the deep-rooted demands of fair play enshrined in the Constitution." Joint Anti Fascist Committee V. McGrath, 341 U.S. 123, 161 (1951) (Frankfurter, J. concurring). In the same opinion Justice Frankfurter gave what has become a frequently cited definition of due process. He said:

> "'Due process' cannot be imprisoned within the treacherous limits of any

> formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, 'due process' is compounded of history, reason, the past course of decisions and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process." Id. at 362-63.

From this we see that due process as contemplated by the protection of the Fourteenth Amendment reaches more than just matters of pure procedure. It reaches out to incorporate concepts of liberty and justice into the interchange between individuals, and more importantly between individuals and their government. It does not establish precise standards for measurement, but it requires that the sense of "fair-play" upon which our nation was founded be consistently respected.

The authorities just reviewed give a concise and clear picture of the objective

to be reached by application of due process. To determine whether the standards and measures of due process concepts are implicated in the facts upon which the issues now before this Court are based, we must examine those facts. Suggesting this course is the opinion of this Court in Kinsella v. U.S., 361 U.S. 234 (1960), where the Court said:

> "Due process has to do with the denial of fundamental fairness shocking to the universal sense of justice; it deals with neither power nor with jurisdiction, but with their excercise." Id. at 246.

Due process requirements of a First Amendment right may be incapable of exact definition because it is not possible to imagine and put parameters around what in the future will be "the denial of fundamental fairness shocking to the universal sense of justice." In the area of voting rights, however, a well established funda-

mental right, it is possible to isolate and identify factors that give continuity and certainity to the decision making process of stare decisis as follows:

(1) ENTITLEMENT.

In order to afford Constitutional protection for the right to vote the assertion of that right must be based on more than a unilateral expectation. The voter must have a present legal entitlement under state, county or municipal law. Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Respondents here, under state law, where entitled to vote in a special election to select the successor to Petitioner Bowles. The District Court held that Petitioner Bowles' first resignation was a withdrawal from office after an election to that office which triggered the requirement of a special election. [C.A. 76a].

(2) PROPER EXERCISE OF AUTHORITY IN GRANTING RELIEF.

In granting relief for the violation of the voting rights of state citizens, federal courts may not properly enter into the supervision of state administration of elections, even Congressional elections. Gray v. Sanders, 372 U.S. 368 (1963), Gamza v. Aguirre, 619 F. 2d 449, 454 (5th Cir. 1980), Griffin v. Burns, 570 F. 2d 1065, 1078 (1st Cir. 1978).

The District Court remedy for the denial of Respondents right to vote was "to order that a special election for Associate Justice of the Georgia Supreme Court be held." [C.A. 77a]. This relief does not involve the District Court, or any Federal Court in supervising the administration of a state election and is a proper remedy under the authorities cited.

(3) IS THERE A COMPELLING STATE INTEREST THAT OUTWEIGHS DENIAL OF THE VOTE?

The duty of the federal courts to protect the right to vote under the First Amendment and the Fourteenth Amendment requires that any state actions depriving citizens of the franchise must be based upon a compelling state interest. Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969), Williams, 393 U.S. at 31, and NAACP v. Button, 371 U.S. 415 (1963).

The only concern voiced by Petitioners in refusing to call the special election was the cost and the possiblity of a low voter turnout. It is undisputed by Respondents that the democratic form of republican government enjoyed in this country is expensive. However, the cost of an election and the possiblity of low voter turnout has never in the history of the nation authorized or provided a sanc-

tion for the deprivation of a citizens right to vote.

(4) THE DEPRIVATION OF THE RIGHT TO VOTE MAY RESULT FROM THE NATURAL CONSEQUENCES OF THE ACTIONS OF STATE OFFICIALS.

> "In order to maintain an action under 42 U.S.C. §1983, it is not necessary to allege or prove that the defendants intended to deprive plaintiffs of their constitutional rights or that they acted wilfully, purposefully or in pursuance of a conspiracy. It is sufficient to establish that the deprivation of constitutional rights or privileges was the natural consequence of the actions of the defendants acting under color of law, irrespective of whether such consequence was intended." Ury v. Santee, 303 F. Supp. 119, 127 (1969), citing Monroe v. Pape, 369 U.S. 167 (1961).

The District Court emphasized in its holding, "that our conclusion is not based on a finding that the defendants objective was to disenfranchise the voters." [C.A. 76a]. The only finding necessary for the relief ordered was:

> "...that the defendant actions had the substantial effect of depriving the plantiffs of their right to vote, and thus constituted a denial of due process." [C.A. 76a].

It is reasonable and appropriate to hold officials responsible for the natural consequences of their action.

> "The public has a right to expect its officers to observe prescribed standards [and statutes] . . . The first step toward insuring these expectations are realized is to require adherence to the standards of due process; absolute and uncontrolled discretion invites abuse." Hornsby v. Allen, 326 F. 2d 605, 610 (5th Cir. 1964).

(5) THE BREACH OF THE REQUIREMENT OF FUNDAMENTAL FAIRNESS RESULTS IN TOTAL DEPRIVATION OF THE RIGHT TO VOTE.

There are numerous instances of election problems and voting rights denials which are brought into federal courts for resolution but which do not present injuries that rise to the level of a Constitutional deprivation. The Court of Appeals

referred to such actions as "garden-variety election challenges." [C.A. 21a-22a]: Powell v. Power, 436 F.2d 84 (2d Cir. 1970) (unintentional error allowed unqualified persons to vote); Hennings v. Grafton, 523 F.2d 861 (7th Cir. 1975) (malfunction of voting machines and innocent human errors in administration): Pettengil v. Putnam County R-1 School District, 472 F.2d 121 (8th Cir. 1973) (illegally cast ballots were mistakenly counted); and Gamza v. Aguirre, supra, (election votes improperly counted).

These examples are representative of instances which involve the administration of state elections. No problem of administration is presented in this appeal because no special election was ever held. However, the refusal to call a special election resulted in a far more serious Constitutional injury, the total deprива-

tion of Respondents' right to vote.

As has been previously discussed in this brief, Justice Harlan spoke of the complete denial the right to vote as a Constitutional injury in Williams. Justice Harlan viewed that problem as one of "denying appellants any opportunity to participate in the procedure by which the President is selected.... 393 U.S. at 41 (Harlan, J. concurring).

From this perspective of the problem, Justice Harlan stated that he:

> "...would rest this decision entirely on the proposition that Ohio's statutory scheme violates the basic right of political association assured by the First Amendment which is protected against state infringement under the Due Process Clause of the Fourteenth Amendment." Id. at 41.

In Smith v. Cherry, 489 F. 2d 1098 (7th Cir. 1973) cert. denied 417 U.S. 910 (1974) it was alleged that a sham candi-

date was offered in the primary, then withdrew, and the local party appointed a prearranged person to replace the primary winner who would stand for election in the general election. In such instances the court said:

> "This deception on the face of the ballot clearly debased the rights of all voters in the election. Such an abridgment of the right to vote is impermissible...." Id. at 1002.

In Griffin v. Burns, 507 F.2d 1065 (1st Cir. 1978) the First Circuit gave four descriptions of instances where due process could be violated by total deprivation of the First Amendment right to exercise the franchise. That court referred to:

> 1. "...wilful conduct which undermines the organic processes by which candidates are elected." Id. at 1077;
> 2. "If the election process itself reaches the point of patent and fundamental unfairness...." Id. at 1077;
> 3. "...where broadgauged unfairness permeates an election, even if de-

rived from apparently neutral action." Id. at 1077;

4. "...where the entire election process--including as part thereof the state's administrative and judicial corrective process--fails on its face to afford fundamental fairness." Id. at 1078.

The problem of total deprivation was also before the court in Ury v. Santee, 303 F. Supp. 119 (N.D. Ill. 1969), where two months prior to the election the incumbent trustees quietly passed a resolution which reduced the number or precincts from 32 to 6. No adequate preparation was made at these precincts to accommodate those wishing to vote, with the result that "hundreds of voters were effectively deprived of their right to vote..." Id. at 125.

A final instance of total deprivation giving rise to a Constitutional injury was considered in Briscoe v. Kusper, 435 F. 2d 1046 (7th Cir. 1970). There relief was

sought by 12 candidates barred from the ballot. Part of the basis for their claim was the denial of due process before the City Board of Election Commissioners. The issue was the failure of the Board to give any access whatsoever to the petitions so that challengers could examine the signatures. The Court stated:

> "...denial of all access to petitions and binders, although they were the substance of the evidence relied upon for disposition of the various claims, was unfair and unconstitutional." Id. at 1057.

The conduct of Petitioners which caused the Constitutional injury complained of here occurred in the quiet and secret of their offices in the State Capitol. Their conduct was tantamount to the denial of access and the in camera inspection complained of in Briscoe.

Petitioners prevented an entire election, required by a Georgia statute,

from being held. They foreclosed any and all opportunity of Respondents to participate in the selection of the successor to Petitioner Bowles.

It was in this context that the District Court could, "...conceive of no more fundamental flaw in the electoral process than the deprivation of the right to vote altogether." [C.A. 66a]. The Court of Appeals stated that it had before it an instance:

> 1. ...where "state officials have purposely abrogated the right to vote, a right that is fundamental to our society and preservative of all individual rights." [C.A. 26a-27a);
>
> 2. ...where "the due process clause of the Fourteenth Amendment forbids state officials from unlawfully eliminating that fundamental right." [C.A. 27a]; and
>
> 3. ...where "The United States Constitution protects against complete deprivation...." [C.A. 27a).

The Court of Appeals correctly held that:

"It is fundamentally unfair and constitutionally impermissible for public officials to disenfranchise voters in violation of state law so that they may fill the seats of government through the power of appointment, [C.A. 27a], "...in this very different case of a fundamental breakdown of the democratic system." [C.A. 28a].

This Court should affirm this expression of the vitality of the rights guaranteed by our Constitution.

b. RESPONDENTS FAILURE TO CALL THE SPECIAL ELECTION REQUIRED BY STATE LAW DEPRIVED PLAINTIFFS OF THEIR RIGHT TO VOTE IN VIOLATION OF THE DUE PROCESS GUARANTEES OF THE FOURTEENTH AMENDMENT.

The District Court and Court of Appeals were justified in holding the conduct of Petitioners denied Respondents the due process requirements of the Fourteenth Amendment. They followed the direction of this Court in Kinsella and specifically evaluated petitioners' exercise of their

"power and jurisdiction." 361 U.S. at 246. Petitioners exercised their power and jurisdiction in the following manner:

Aug. 1980	Bowles and Tidwell discuss method for replacing Bowles as party nominee; Busbee could not control [C.A. 54a]
Sept. 24	Busbee, Bowles and Tidwell discuss timing of Bowles' resignation; none aware of special election statute [C.A. 54a]
Nov. 4	Bowles elected to suceed himself. [C.A. 54a]
Nov. 20 1980	Bowles resigns "with deep regret," "effective December 31, 1980." [J.A. 25]
Nov. 20	Gov. Busbee activates Judicial Nominating Commission to select a successor to Bowles for term starting Jan. 1, 1981, to be filled by executive appointment. [R. 12, lines 10-21]
Nov. 21	Busbee accepts Bowles' resignation. [J.A. 25]
Nov. 21	Bowles issues statement saying his request that "his resignation be made effective as of Dec. 31," had been accepted and he would join his son in private practice thereafter. [J.A. 44-46]

Nov. 21	Supreme Court Chief Justice issues statement wishing Bowles well in private practice. [J.A. 47]
Nov. 24	Busbee and Tidwell meet after public calls for special election to discuss statutory requirement for first time. [C.A. 57a]
Dec. 4	Busbee publicly announces because of expense and low turnout he will appoint a successor to Bowles. [J.A. 26, 27]
Dec. 5	Letter of Governor's Executive Counsel confirms: (1) He expects Bowles to resign shortly after assuming office; and (2) The Judicial Nominating Commission is looking for nominees for Bowles' replacement [J.A. 29-30]
Dec. 15	Bowles takes oath for new term. [C.A. 59a]
Dec. 16	Judicial Nominating Commission gives Busbee list of candidates for gubernatorial appointment to Bowles' new term. [R. 18, lines 2-7]
Dec. 18	Busbee interviews Gregory for vacancy. [C.A. 59a, R. 173 line 16 - 174 line 5]
Jan. 5	Bowles resigns new term after working a few hours. [J.A. 34]

Jan. 6 Bowles is on the job in private practice "very early." [R. 74, lines 2-9]

The review of these facts reveals how these officials exercised their power and jurisdiction for the purpose of preserving the appointive power of Petitioner Busbee in violation of the Constitutional rights of Respondents. Such a seizure may typify a totalitarian dictatorship, but it should not be tolerated within our Constitutional regime.

If the conduct of Petitioners does not represent an attack on the very foundations of our democratic system, to insure a government by the people and representative of the people, then there is no law in this land to prevent the governor from taking the next logical step -- to appoint ALL judges, regardless of when they end their terms, and regardless of Georgia constitutional provisions, and then all

officers of his choosing. Petitioners' action in cancelling this judge's election, required by the state constitution, is a treacherous step.

2. PETITIONERS' DEPRIVATION OF RESPONDENTS' RIGHT TO VOTE IN VIOLATION OF THE PROTECTIONS AFFORDED BY THE DUE PROCESS GUARANTEES OF THE FOURTEENTH AMENDMENT ESTABLISHES RESPONDENTS' CAUSE OF ACTION UNDER 42 U.S.C. 1983.

There is no question that at all times Petitioners engaged in the conduct described, they were acting under color of state law as contemplated by 42 U.S.C. 1983. This has never been disputed. The fact that respondents were deprived of their right to vote cannot be and is not disputed. No special election to replace Petitioner Bowles was ever held! The manner in which Respondents were deprived of their right to vote was in violation of

the due process protection afforded that right under the Fourteenth Amendment. Deprivation of a right secured by the Constitution, in violation of the protection afforded that right by the Constitution sets forth a Constitutional deprivation that supports a cause of action under §1983, Baker v. McCollan, 443 U.S. 137 (1979), Parratt v. Taylor, 451 U.S. 527 (1981). Petitioners acknowledge the verity of this position under the authority of Monroe v. Pape, supra, in their note 25 on page 39, Brief of Petitioners.

The fact that Petitioners violated state law in depriving Respondents of their right to vote only amplifies the offense and establishes more clearly that relief is required in the federal courts under §1983. These actions by state officials in depriving citizens of constitutionally protected rights are precisely

the actions §1983 was enacted to remedy. In the process of protecting rights in this fashion a tension exists between the enforcement of causes of action in federal court against state officials under §1983, which is quite correctly of concern to this Court. For example, in Davis v. Paul, 424 U.S. 693 (1976), the Court held that §1983 was not enacted in order to create through the Fourteenth Amendment a system of federal tort law superimposed upon the states. But such tension is not present in the issues presented here.

The deprivation involved here is of the most basic Constitutional right in a manner which is fundamentally unfair and shocking. The legislative history of the predecessors of §1983 shows that the enacting legislature had a view that,

> "... a deprivation of a constitutional right is significantly different from and more serious than a

> violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right." Monroe v. Pape, 365 U.S. 167, 196 (1961) (Harlan, J. Concurring.)

Monroe set the parameters for a cause of action under §1983 and held that Congress intended to give a remedy to parties deprived of Constitutional rights by the abuse of power by state officials. §1983 represents the seriousness with which a remedy exists against those who, representing the state, such as these Petitioners, are unwilling to follow state law. This case represents how seriously Constitutional rights can be infringed, to the point of causing "a fundamental breakdown of the democratic system." [C.A. 28A]

C. NEITHER SNOWDEN V. HUGHES NOR THE TENTH AMENDMENT PRECLUDE RESPONDENTS' CAUSE OF ACTION.

1. SNOWDEN V. HUGHES DOES NOT IMPAIR THE ABILITY OF FEDERAL COURTS TO PROVIDE RELIEF FOR THE DEPRIVATION OF THE CONSTITUTIONALLY PROTECTED RIGHTS ASSERTED BY RESPONDENTS.

In Snowden v. Hughes, 321 U.S. 1 (1944) the issue was whether a candidate as plaintiff sufficiently plead a Constitutional cause of action. But what is before this Court on this appeal is a fully plead, tried and argued presentation of a course of conduct which has been judicially determined to have caused a "fundamental breakdown of the democratic system." [C.A. 28a]. Because this Court did not have a record of facts before it in Snowden, any holding asserted in Snowden must of necessity have limited application.

In Snowden a candidate for the Illinois legislature came in second in a race for a seat from a district which had pro-

portional representation. The candidate complained that he had been denied the protection of the Fourteenth Amendment securing "rights, privileges and immunities," and the "equal protection of the laws," because the State Primary Canvassing Board failed to declare him a nominee, which would have virtually assured him election in the general election. Id. at 3-4. This Court ruled that the candidate failed to state a cause of action within the jurisdiction of the federal court. Basing its ruling solely on the allegations of the complaint, the Court concluded, "that the right asserted by petitioner is not one secured by the Fourteenth Amendment." Id. at 13. The Court summarized its holding pertaining to equal protection allegations when it said:

> "Mere violation of a state statute does not infringe the federal Constitution." Id. at 11.

Thus, Snowden may have prevailed if he had plead his facts better. See Briscoe v. Kusper, 435 F.2d 1046, 1053 (7th Cir. 1970). (In the same term that Snowden was decided, this Court took the opportunity to again state that Constitutional protection was afforded the right to vote in state elections. Smith v. Allwright, 321 U.S. 649, 661-662 (1944).)

Further citations of Snowden by this Court have demonstrated its inapplicability to the issues presented in this appeal.

(1) SUPREME COURT DECISIONS CITING SNOWDEN:

Snowden has been quoted in only three decisions since its publication in 1944. In all of these its application has been limited.

(a) Since the allegations in the Snowden complaint were found wanting, the Court did not reach the question of whe-

ther the forerunner of §1983 could have been used to protect the rights asserted by the candidate. In Great American Federal Savings & Loan Association v. Novotny, 442 U.S. 366, 371, n. 8 (1979), this Court stated:

> "In Snowden..., the plaintiff had also stated claims under the predecessors of both sections [§1983, §1985]. The Court held that no Constitutional violation had been shown, and did not consider whether the statute could have been utilized if such a showing had been made." Id. at 371.

(b) In Oregon v. Mitchell, 400 U.S. 112 (1970), Snowden was cited regarding the application of the privileges and immunities clause, which is not an issue in this certiorari case. Id. at 148 n. 13. In this same note, the Oregon decision goes to some length to show that the authorities relied upon in Snowden have been overruled or weakened.

(c) This Court's only other quotation of Snowden appears in Bullock v. Carter, 405 U.S. 134 (1972), where the Court struck down a Texas filing fee requirement for state elections as violative of the equal protection principles. The Court took a decided turn away from Snowden, stating:

> "The initial and direct impact of filing fees is felt by aspirants for office, rather than voters, and the Court has not heretofore attached such fundamental status to candidacy as to invoke a rigorous standard. However, the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." Id. at 143.

This short quote is significant to this appeal. Petitioners cannot apply Snowden, a case dealing with candidate's denial of office, without EQUATING candidates' rights with voters' rights, and equating these rights at the time SNOWDEN

was decided (1344). Not until in the 1970's were candidates' rights coming to receive the protections which had long been established and preserved for voters. Lubin v. Panish, 415 U.S. 709 (1974), in which Mr. Justice Douglas, concurring, sums up the rights of voters and candidates:

> "Voting is clearly a fundamental right.... [T]he right to vote in state elections is one of the rights historically retained by the people by virtue of the Ninth Amendment as well as included in the penumbra of First Amendment rights. As Mr. Justice Brennan stated in Storer v. Brown, 415 U.S. 724..., 'The right to vote derives from the right of association that is at the core of the First Amendment, protected from state infringement by the Fourteenth Amendment.' (Dissenting opinion.) ...But the right to vote would be empty if the State could arbitrarily deny the right to stand for election." Id. at 721-722. (Citations omitted.)

The Lubin and Bullock cases place Snowden's ruling in perspective. These decisions establish that a candidate's right to a state office will be protected

by the First and Fourteenth Amendments if the candidate can show sufficient facts to demonstrate a Constitutionally protected right. The candidate in Snowden could not show a protected right; Respondents here have proven the deprivation of such a right.

Other federal cases have limited Snowden's application, for example; Smith v. Cherry, supra, 1103; Williams v. Scalfani, 444 F. Supp. 906 (1978). In Briscoe v. Kusper, 435 F.2d 1046, 1053 (7th Cir. 1970), the Seventh Circuit stated:

> "It is apparent from the opinions of the Supreme Court in both Snowden and Taylor & Marshall that the rights in question were presented as purely state rights to public employment and were narrowly considered." Id. at 1053.

(2) SNOWDEN'S DUE PROCESS TREATMENT

The due process consideration in Snowden is restricted to one sentence. (Snowden, 321 U.S. at 7.) As shown in the

decisions cited above, Snowden is not relied upon by this Court for its due process statement.

The major authority cited by Snowden in support of its due process statement is Taylor & Marshall v. Beckham, 178 U.S. 548 (1899). There an elected state governor was ousted from his office without evidentiary considerations in violation of state election procedure for challenging elections.

Mr. Justice Harlan, in a strong dissent in Taylor & Marshall, pointed out four instances of candidates claiming due process infringement of a state office where this Court DID grant jurisdiction, but then decided that the petitioner had not proved his case. Id. at 592-598.

An additional distinction from the issues presented here is that in both Taylor and Marshall and Snowden the right of

a candidate to office was considered a property right. The property interest in public office, like the property interest in employment, is safeguarded by the due process clause, as shown in Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972). The court said what a plaintiff must show is an entitlement to his job created by state law or regulation. Once shown, the Constitutional due process protection is invoked.

(3) SNOWDEN CAN BE DISTINGUISHED ON ITS FACTS FROM THE CASE NOW BEFORE THIS COURT.

The facts in Snowden, brief as they are because only pleadings were before the Court (and because the Court refused to consider Snowden's conclusory allegations as to "wilful, malicious, arbitrary," etc.), show a candidate denied office because of a violation of a state law.

While the Snowden candidate's allegations are serious, the violations of state law, state constitution and United States Constitution inflicted on Georgia voters by Petitioners presents an undeniable and fundamental breakdown of our political system.

The officials in the present appeal are not members of a State Canvassing Board or such other committee, but are constitutional officers and heads of two branches of Georgia's government. They violated the basic right to vote not of one person, but 3,000,000 Georgia voters.

> "[A]lthough the right of suffrage comes from the state, yet when granted it will be protected, and he 'who has it can only be deprived of it by due process of law.'" Taylor v. Beckham, 178 U.S. at 603 (Harlan, J., dissenting), quoting from Minor v. Happersett, 21 Wall 162 (which was inappropriately quoted as authority in Snowden).

Petitioners did not deprive someone of property rights to a job. What they did was disenfranchise Respondents and an entire state citizenry. They boldly usurped the power granted in our state constitution, and secured by the Federal Constitution, to THE PEOPLE to select their public officials.

This fundamental right must be remedied or else a precedent of fearful dimensions is established which does threaten our Constitutional form of government.

2. THE TENTH AMENDMENT DOES NOT PROVIDE INSULATION TO STATE OFFICERS WHO CAUSE A FUNDAMENTAL BREAKDOWN OF THE DEMOCRATIC SYSTEM IN A STATE.

The Tenth Amendment allows:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." (Emphasis supplied.)

Petitioners attempt to escape their total disenfranchisement of the electorate of a voting right GUARANTEED BY STATE LAW by hiding behind the states' "power to prescribe the qualifications of their own officers, the tenure of their offices," and numerous other laws governing qualifications of electors and administration of elections. Maddox v. Fortson, 226 Ga. 71, 75 (1970), 172 SE 2d 595, cert. denied 397 U.S. 149.

Petitioners claim that it is the Tenth Amendment which holds the federal government in check from annulling the states. "Thus, the States--the primary protectors of the people's life, liberty, and property--would not be engulfed." (Brief of Petitioners, p. 26). However, Petitioners artfully obscure those most unfortunate instances when the states, acting through their duly qualified offi-

cers, fail to provide this necessary protection to the people. In such instances, those officers, and Petitioners here, lose all claims to this Tenth Amendment protection. Even the Tenth Amendment does not immunize states from the deliberate infringement of federally protected rights.

> "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right." Gray v. Sanders, 372 U.S. 368, 381 (1963).

Petitioners say:

> "The Tenth Amendment thus places substantive limits upon the powers of the Federal government to act in areas essential to the sovereignity of the states, and the determination of how State Supreme Court Justices are selected is such an area." (Brief of Petitioners, p. 27.)

Respondents are in total agreement. However, Petitioners demonstrate a convenient blindness to the existing laws of Georgia. The public policy question of

the means employed to select the appellate judiciary in Georgia has been settled for some time. It is not under any challenge by Respondents now. That selection generally is by election, Ga. Code Ann. §2-3103, and by special election under the facts of this case, Ga. Code Ann. §34-1514. The Petitioners assert a hollow argument that somehow Respondents desire or expect the federal courts to interfere with the ability of this State to make these determinations. Such interference would certainly be inappropriate. Democratic Party of the United States v. La Follette, ____ U.S. ____ 101 S. Ct. 1010, 1020 (1981). Respondents merely want Petitioners to abide by these laws; their sole interest is in preserving and protecting these laws, specifically Ga. Code Ann. §34-1514.

There is a strong interest in the protection of federally protected and secured rights against state infringement. Williams v. Rhodes, 393 U.S. 23 (1968). And it is the Petitioners here who have unlawfully eliminated a federally protected right in such a manner that they caused a fundamental breakdown in the democratic system in Georgia. Not even the Tenth Amendment sanctions such conduct or prohibits a remedy.

II. THE ALLEGED AVAILABILITY OF STATE COURT REMEDIES DOES NOT AFFECT RESPONDENTS' ABILITY TO SEEK RELIEF IN FEDERAL COURT WHEN THEIR RIGHT TO VOTE IS DENIED IN VIOLATION OF THE FOURTEENTH AMENDMENT.

A. THE HOLDING OF PARRATT V. TAYLOR IN NO WAY LIMITS OR PRECLUDES THE RELIEF AVAILABLE TO RESPONDENTS IN THIS ACTION PURSUANT TO 42 U.S.C. 1983.

Petitioners attempt to assert that the recent decision of this court in Parratt v. Taylor, 451 U.S. 527 (1981), precludes the relief sought by Petitioners under §1983. The alleged availability of state remedies is claimed to satisfy procedural due process guaranteed by the Fourteenth Amendment, and therefore, the deprivation of the right to vote does not rise to the level of a Constitutional deprivation. In making this assertion, Peti-

tioners are forced to make a blatant misstatement of the principles of Constitutional law. Petitioners assert that due process protection is a Constitutional right which in and of itself may be deprived if procedural safeguards are present. As has been clearly shown, the substantive protection given to First Amendment rights by the Fourteenth Amendment is the protection of right and not the creation of a right. The Constitutional right involved in this appeal is the First Amendment right to vote. Petitioner's argument is so clearly specious that the very subtlety of it can only be refuted by a simple statement of the correct principles of law. Respondents were deprived of a Constitutionally protected right, the right to vote, and the manner in which this deprivation was done violated the protection of the guarantees of the Due

Process clause of the Fourteenth Amendment. This establishes a Constitutional deprivation for which §1983 is a remedy. No amount of procedure, if any was available in the state courts, would preclude relief in the federal courts. Once a Constitutional deprivation under state law is established, §1983 clearly provides a remedy in federal court. "The federal remedy is supplementary to the state remedy and the latter need not be first sought and refused before the federal one is invoked." Monroe v. Pape, 365 U.S. 167, 183 (1967).

Parratt cannot apply to the claim of Respondents here because the Court in Parratt had before it the issue of what constitutes a Constitutional deprivation of property for purposes of procedural due process. To cite Parratt as authority for the instances now before the Court, of a

deprivation of a liberty interest, is to push Parratt beyond its intended reach.

This is clearly the point made by Justice Blackmun when he said:

> "This suit concerns the deprivation only of property and was brought only against supervisory personnel, whose simple 'negligence' was assumed but, on this record, not actually proved. I do not read the Court's opinion as applicable to a case concerning deprivation of life or of liberty.... I continue to believe that there are certain governmental actions that, even if undertaken with a full panoply of procedural protection, are in and of themselves, antithetical to fundamental notions of due process." Id. at 545. (Blackmun, J. concurring). (Citations omitted).

Justice Powell also clearly stated in his concurring opinion that the Court in making its decision had avoided entirely the substantive limitations on government conduct from the due process clause. Id. at 552-53. Justice Powell's statements support the relief accorded Respondents in this case in saying that §1983 was enacted

to deter real abuses by state officials in the exercise of government power, Id. at 549. The abuses of Petitioners here were certainly real; they resulted in the deprivation of the most fundamental right of a free people.

The following factors were present in Parratt which contributed to the decision and are not present in this case. The Parratt deprivation was trivial, hobby materials purchased for $23.50. Here the most fundamental Constitutional right was denied. The Parratt deprivation was accomplished by the negligent actions of state officials. In the present case, the actions of state officials in refusing to call a special election and filling the vacancy on the Supreme Court were intentional. Parratt involved deprivation of a property right and the holding was specifically limited in that regard by Jus-

tice Blackmun. Plaintiffs here were deprived of the right to vote, a liberty right. Parratt dealt with the guarantees of procedural due process, and as earlier stated, specifically is not instructive on the subject of due process protection of liberty interests. It is indeed a tribute to the importance of the rights involved in the present case and the enormity of the violation of those rights, that Parratt, a case generally read to limit the availability of relief, actually in the sections cited supports the relief granted to Respondents. The facts found by the District Court here present to this Court a flagrant violation of the most fundamental of all Constitutional rights by state officials sworn to uphold the law and protect the rights of citizens such as Respondents. There is no just rule of law which will deny the vindication of rights

and relief afforded Respondents by the District Court.

B. MANDAMUS WAS NOT A STATE REMEDY AVAILABLE TO RESPONDENTS, AND IF IT WERE, THE MONROE V. PAPE NONEXHAUSTION PRINCIPLE APPLIES.

Since the ruling in Parratt v. Taylor is not relevant, the question of whether voters had a state court remedy is also irrelevant. Respondents are not asserting a procedural due process violation which can be "cured" by a common law action and post-deprivation hearing in state court.

Petitioner David B. Poythress, Georgia's Secretary of State, whose duty it is to call special elections and who would be the defendant in the mandamus action Petitioners claim Respondents must bring, stated in his deposition why mandamus must fail: because he BELIEVED Justice Bowles when, in December 1980, Petitioner Bowles

took the oath and told Petitioner Poythress that he, the elected official, would serve. It was only after the time had expired for calling a special election (after December 31, 1980) that the plan to deprive voters of an election became apparent to those other than Petitioners. By that time, there was no "duty to be enforced" in a mandamus action as the time to call a special election had expired. Skrine v. Kim, 242 Ga. 185, 187 (1978). [Deposition of Poythress, R. 339 lines 14-25, 340 lines 1-25, 342 lines 13-25, and 345 line 2, 347 line 8].

In fact, as Judge Freeman states, the ultimate conclusion, the findings of fact in this case, was that a special election had been carefully avoided by Petitioners Busbee and Bowles to throw the appointive power to Governor Busbee. [C.A. 76a-77a]. The effect of the artful and technical

attempts to step around the special election law was the disenfranchisement of 3,000,000 Georgia voters. The District Court held that mandamus was not a remedy available to Respondents, "...due to Justice Bowles 'taking the oath of office for the new term and' Justice Gregory's appointment on January 6, 1981." [C.A. 63a].

The constitutional wrong here--the violation of a right protected by due process which deprived voters-Respondents of the constitutionally protected right to vote--may be tried in a federal forum without exhaustion of state remedies (assuming such remedies are available, which is not the case here.), Monroe v. Pape, 365 U.S. 167 (1961). Parratt did not change this rule. In fact, the court in Fair Assessment in Real Estate Association, Inc. v. McNary, ___ U.S. _____, 102 S. Ct. 177 (1981) (Rehnquist, J.) recently

recently specifically affirmed the Monroe rule in §1983 actions except where a challenge to state tax laws is made:

> "It was not until our decision in Monroe v. Pape, 365 U.S. 167 (1961), that §1983 was held to authorize immediate resort to federal court whenever state actions allegedly infringed constitutional rights.... "The immediacy of federal relief under §1983 was reemphasized in McNeese v. Board of Education, 373 U.S. 668 (1963), where the Court stated that "'[i]t is immaterial whether [the state official's] conduct is legal or illegal as a matter of state law. Such claims are entitled to be adjudicated in the federal courts.' Id. at 674, 83 S. Ct., at 1437." Id. at 180. [Brackets in opinion.]

III. THE DISTRICT COURT CORRECTLY REJECTED ABSTENTION BECAUSE THE STATE LAW IS CLEAR.

Abstention is the exception to the obligation of the federal judiciary to exercise its jurisdiction:

> "Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of forum for the hearing and decision of his federal Constitution claims. Plainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility, equally with the federal courts, '...to guard, enforce, and protect every right granted or secured by the Constitution of the United States....'
>
> "'We yet like to believe that wherever the Federal court sits, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum.' Zwickler v. Koota, 389 U.S. 241, 248 (1967)." Fair Assessment in Real Estate, Inc. v. McNary, ___ U.S. ___, 102 S. Ct. 177, 190 n.12 (1981) (Brennan, J., concurring).

As an exception, abstention was never intended to provide a shield to Petitioners who caused a fundamental breakdown in the democratic system. Abstention was crafted to show respect for the legitimate interests and affairs of the states. To do otherwise would be to convert abstention "from an exception into a general rule." Examining Board v. Flores De Otero, 426 U.S. 572, 598 (1976).

The well-known test for abstention is the Pullman doctrine, from Railroad Commission v. Pullman Co., 312 U.S. 496 (1941), where this Court was faced with state law which was "far from clear." Id. at 499. Petitioners argue that the Pullman rule should be applied because the state law is "undecided;" that resolution of this "undecided" state law will dissolve Respondents' Constitutional claim; and that Respondents' right to vote can be

delayed indefinitely until some conclusion is reached in state court without harm to their right to vote.

A. THE GEORGIA STATUTE ON SPECIAL ELECTIONS IS CLEAR.

The district court sets out the Pullman test on clarity of state laws:

> "[W]hether the state law question presents difficult, obscure, or unclear issues of state law..." [C.A. 61a]

Justice Frankfurter provided some helpful guidance on a definition of unclear state law when he said the statute before the Court in Pullman left the Court "groping utterly in the dark." Burford v. Sun Oil Co., 319 U.S. 315, 338 (1943), (Frankfurter, J. dissenting). Until now, no one has ever groped in the dark over Ga. Code Ann. §34-1514.

Because the state law on special elections is clear, being neither "diffi-

cult" nor "obscure," Petitioners are left with only an argument that the state law is "unsettled." [Brief of Petitioners, p. 43]. "Unsettled" is not the Pullman test and obviously means something much different. Sayers v. Forsyth Building Corp., 417 F.2d 65 (5th Cir. 1969), holds that "novel" or "unsettled" questions are not reasons to abstain. Because a law has not been judicially interpreted does not mean that it is unclear. McNeese v. Board of Education, 373 U.S. 668, 676 (1963).

The special election procedure in Georgia is clear: Ga. Code Ann. §34-1514. This statute focuses on a very narrow span of time--after a candidate is elected, but before he takes office. If the candidate gets elected but dies or resigns his office before the time to take office, then a special election must be called.

The problem which gave rise to

Respondents' action and this appeal is that Justice Bowles resigned from office (November 20, 1980) without realizing he had triggered the special election statute. The facts allow for no other position.

Only one event--the actual oath-taking--supports a different conclusion. ALL OTHER actions and statements by Petitioners Busbee and Bowles, and Busbee's agent Tidwell demonstrate that:

The purpose of Bowles' oath-taking was <u>not</u> to uphold Petitioners' confused and convoluted interpretation of Georgia law. The only purpose of the oath-taking was to bridge the gap in the special election law between election and taking office so that Busbee could then appoint. [C.A. 75a].

But all of these attempts fail because nowhere in Georgia law is there pro-

vision for rescinding a resignation once it is accepted. A resignation is made to the official giving the commission of office (justices receive their commissions from the Governor, Ga. Code §89-201; resignations of commissions received by Governor are given to Governor, Ga. Code §89-504). An office shall be vacated "by resignation, when accepted," Ga. Code §89-501(2). Resignations, when accepted, must be final for an orderly government; otherwise, office holders could jump in and out of office at their whim.

Therefore, after the Governor's acceptance of Justice Bowles' resignation, the provisions of a special election statute had attached and could not be changed regardless of future events.

Petitioners' claims of "unclear" state law rest on four essential so-called "limiting constructions" of the Georgia

statute (Brief of Petitioners, pp. 44-47), the fourth of which, the rescission of the resignation, has just been considered. A discussion of the first three follows. These are precisely the same arguments which the Court of Appeals summarily dismissed as "creative arguments by the Georgia officials," [C.A. 14a], and they deserve no more serious treatment here. (The facts which support the rejection of these arguments were found by the District Court. None of these findings has been attacked by the Petitioners, and therefore the facts as found cannot be ignored or reversed by this Court. United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).)

(1) In their first "limiting construction," Petitioners now say an officer cannot resign from a term he does not have. The District Court carefully analy-

zed this assertion and stated, "One resigns from an office, not a term of office." [C.A. 73a].

Petitioners argued previously in this case that:

> "Justice Bowles Had A Vested Right...
> ....
> ...his right had ripened into a six year tenure of office by virtue of his election [on November 4, 1980] to the Supreme Court." [R. 641, 642].

Petitioners have asserted these inconsistent positions in order to seek to justify their behavior.

(2) In their next "limiting construction" Petitioners claim Georgia law recognizes a distinction between resignation and withdrawal, but have cited no law setting out that distinction. Nor is this distinction made in any law or standard dictionary, thesaurus, or words and phrases. In a legal thesaurus "resign" and "withdraw" are listed as synonyms for each

other. W. Burton, Legal Thesaurus, Regular Edition, 449-50, 514 (1980). In Webster's New Collegiate Dictionary (1961), "resign" is defined as "to with draw (from) formally, as, the governor has resigned." Id. at 721.

This second premise of Petitioners is also contradicted by Petitioners' actions. When Petitioner Bowles resigned, Petitioner Busbee and his agent, Charles Tidwell acted as if Petitioner Bowles was permanently leaving the bench, because as Petitioners state, "Justice Bowles' November 20th letter (of resignation).... was intended to and had the effect of initiating the judicial nominating process. [R. 215] [sic. R. 216, lines 8-11] (Brief of Petitioners, p. 5, asterisk). Could Justice Bowles really have had Petitioners' hair-splitting distinctions in mind as he wrote his November 20 resignation, and at the

same time be uncertain of whether the resignation should contain an effective date? [R. 211, lines 2-25 and 212, lines 1-4].

The District Court saw these "distinctions" were "of recent origin" and rejected them. [C.A. 73a-74a].

(3) In the final "limiting construction" considered, Petitioners say a resignation for special election must be delivered to the Secretary of State. This statement directly contradicts the Georgia law, Ga. Code §89-504. Petitioners' argument here also DIRECTLY CONTRADICTS an opinion issued and published by the Attorney General of Georgia April 15, 1974, U74-29, a copy of which marked Exhibit "A," is attached hereto for the convenience of the Court.

In this opinion, the Attorney General said "the proper procedure to be followed

by a sheriff when resigning" when the office to be filled requires a special election, is for the official to submit his resignation to the Governor, then a special election will be called by the official responsible for elections (in this case, the Secretary of State).

This opinion puts the lie to Petitioners' assertions that a resignation, to be effective, MUST be directed to the Secretary of State and that a resignation is not a withdrawal. [Brief of Petitioners, pp. 45-46.]

When this action started, a total of five Georgia Attorney General opinions had been issued and published on the Georgia special election statute, Ga. Code §34-1514 since its passage in 1970. Yet never once was its clarity questioned until this case. The others are Opin. Atty. Gen. U75-2, 76-56, 78-60, U78-44. It was only

for this case that the Petitioners' intricate interpretations were developed. [C.A. 73a].

This is further evidence that Petitioners assert condradictory interpretations in order to seek to justify their behavior.

Their only motive is to preserve the appointive power over the appellate judiciary and avoid a special election.

B. NO REASONABLE PROBABILITY EXISTS THAT THE STATE COURTS WOULD ELIMINATE THE FEDERAL CONSTITUTIONAL ISSUE.

Lack of clarity of a state statute is significant only "When there is sufficient ambiguity in state law to create a reasonable probability that state courts could eliminate or alter the federal Constitutional issue." Zwickler v. Koota, 389 U.S. 241, 248 (1967).

The District Court and the Court of Appeals were unanimous in their agreement that the state courts would not resolve the issue any other way:

> "The statute is so clear that this case offers little hope of avoiding constitutional adjudication by deferring federal decision while the Georgia voters initiate state proceedings." [C.A. 15a].

Thus, Georgia voters had a right to a special election the moment Justice Bowles' resignation of November 20, 1980, was accepted by Governor Busbee ("All offices in this State shall be vacated - ... By resignation, when accepted." Ga. Code §89-501(2)). Respondents' right vested on November 21, 1980 (date of Busbee's acceptance letter [J.A. 25]). No amount of after the fact state court litigation will erradicate Respondents' right to a special election.

It is important to point out that, unlike the cases in which abstention is given great consideration because a state law or procedure is challenged, Respondents do not attack or challenge the constitutionality of any statute or any regulatory or administrative scheme. Respondents wish to apply the special election law according to its plain and simple language, and according to the way Georgia's Attorney General interpreted it until this case was filed. Only the bizarre acts of two Petitioners are challenged, and a third Petitioner's unwillingness to call the election.

Abstention should not be allowed based upon Petitioners hopes that state court interpretation will dissolve the constitutional issue. Examining Board v. Flores De Otero, 426 U.S. 572, 598 (1976). The District Court did not abuse its discre-

tion in refusing to abstain. Harman v. Forssenius, 380 U.S. 528 (1965). [C.A. 16a-17a].

C. PULLMAN ABSTENTION PRINCIPLES WILL BE DISTORTED BY ABSTAINING IN THIS ACTION.

The policies justifying abstention in Pullman were summarized by Justice Black in Younger v. Harris, 401 U.S. 37, 44 (1979). Justice Black hinged his entire principle of federal-state relations, "Our Federalism," on respect for the "legitimate" interests and activities of the state. He never contemplated that "federalism" or the abstention doctrine would ever be applied as a shield to sanction the illegitimate activities of the state, or to promote illegitimate interests.

What is now before this Court is nothing other than a course of conduct found as fact by the District Court, which is

illegitimate and which promotes no interests of the state. The words of the District Court leave no room for argument on this point. [C.A. 60a-61a, 74a and 76a].

D. RESOLVING THE ISSUES RAISED IN THIS APPEAL IN FEDERAL COURTS AVOIDS PROBLEMS WHICH COULD TOUCH ON THIS ACTION.

1. The personal knowledge of the members of the Georgia Supreme Court.

If this action were forced through the state courts, it is a certainty that the Supreme Court of Georgia would be required to make a final ruling. All of the present members of that Court are personally acquainted with most of the Petitioners and have personal knowledge of the events surrounding the action.

Under cross-examination at the trial, then Chief Justice Undercofler stated that he was not surprised or startled that Pe-

titioner Bowles took the oath of office on December 15, 1980, after submitting his resignation on November 20, 1980. [R. 235, lines 4-7]. In light of this resignation, Justice Undercofler stated that he expected Petitioner Bowles to begin serving his new term, but could not give any reason for this belief except that it "was just my conclusion" [R. 239, lines 2-5].

Although members of the appellate judiciary in Georgia are not subject to the requirements of 28 U.S.C. 455, which provides for the disqualification of a judge who has "personal knowledge" of the facts in dispute in an action, it certainly raises the question of whether it is in the best interest of the Georgia Supreme Court to be subjected to having to pass on the events surrounding the replacement of one of its members.

2. The custom of appointments to the appellate judiciary in Georgia.

The District Court correctly spoke of the "custom" of appointing appellate judges. [C.A. 76a]. All but one of the present members of the Georgia Supreme Court initially entered the Court by appointment (Trial Exhibit "X", a copy of which marked Exhibit "X" is attached hereto), and that exception was elected to the Court after being initially appointed by Petitioner Busbee to the Georgia Court of Appeals. The appointment "custom" has resulted in no Republican being on the Georgia appellate courts for at least the last 30 years. Ga. Official & Statistical Register, 1953-1980.

In light of the decision in Gibson v. Berryhill, 411 U.S. 564 (1973), we know that the makeup of a reviewing board may prevent it from properly deciding issues

put before it. The issues presented by this appeal may reflect on the practice and procedure experienced by each member of the Georgia Supreme Court in becoming members of that Court. That Court should not be forced into the position of having to decide these questions, especially since the rule of necessity need not come into play.

E. PETITIONERS' UNLAWFUL ELIMINATION OF AN ELECTION CAUSED A FUNDAMENTAL BREAKDOWN OF THE DEMOCRATIC SYSTEM AND DEMANDS A PROMPT REMEDY.

When protection of a basic First Amendment right is delayed, as would necessarily occur if the court required abstention, that delay "might iself effect the impermissible chilling of the very constitutional right" for which the protection is sought. Zwickler, 389 U.S. at 252. Respondents have already suffered

an unconscionable and grievous injury by being deprived of an election in which they could vote. This opportunity is daily prejudiced by continued denial.

Even more than just "chilling" the rights of these Respondents, the conduct of Petitioners demonstrates the truth of the warning that, "We live in a shrinking island of free constitutional practice." F. A. Schaeffer & C. E. Koop, Whatever Happened to the Human Race? 194 (1979). Respondents' seek the required election as an effort to resist that shrinkage, to insure that our most basic citizen rights are respected, and in this instance to "offset the rise of authoritarian governments and the loss of humanness in our society." Schaeffer & Koop at 194.

The special election should have been held in December 1980. Voters can never be returned to the status quo of that

time, but can only urge that prompt consideration of these issues will restore the franchise.

Accordingly, Respondents specifically request this Court to take this appeal under consideration without the necessity of oral argument, in hopes that a decision could be reached prior to the end of the Court's 1981 term.

CONCLUSION

Respondents are entitled to the award of a special election and the other relief granted by the District Court and affirmed by the Court of Appeals:

(1) Petitioners' actions created the requirements for a special election.

(2) The vote sought is clearly required by state law (Ga. Code §34-1514, which applies the State constitutional mandate that Georgia Supreme Court justices be elected to their terms, Ga. Code §2-3103).

(3) The right to vote in an election required by state law, is constitutionally protected by the First Amendment, as applied to the states through the Fourteenth Amendment.

(4) Petitioners deliberately avoided the special election in a manner which "purposely abrogated" [C.A. 26a-27a] the rights of respondents and all Georgia voters to exercise their franchise.

(5) Petitioners conduct deprived Respondents of the due process guarantees of the Fourteenth Amendment, and thereby established Respondents' cause of action under 42 U.S.C. 1983.

(6) Relief for Respondents will not involve the Court at all in the administration of a state election. The special election will be administered as is every other election in Georgia, according to the election code of Georgia.

(7) The Governor and a Georgia Supreme Court justice subverted our state constitution and statute at the expense of a federally protected Constitutional right. This sets an ominous and dangerous

precedent. These two heads of two branches of state government usurped the Constitutionally protected right of Georgia citizens to elect a high government official.

> "The rights of individuals and the justice due them, are as dear and precious as those of States. Indeed, the latter are founded upon the former; and the great end and object of them must be to secure and support the rights of individuals, or else vain is Government." Justice Cushing in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 468 (1793).

Respectfully submitted,

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William F. Rucker
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Atlanta, Georgia 30303

Attorneys for Respondents
Duncan and Stout

May 5, 1982

PLEASE ADDRESS ALL
COMMUNICATIONS TO:

WILLIAM B. HOLLBERG
1750 Peachtree Street, N.W.
Suite 375
Atlanta, Georgia 30309

UNOFFICIAL OPINION U74-29

To: Ordinary, Forsyth County April 15, 1974

Re: A sheriff may resign by submitting his resignation to the Governor of the State. As soon as the resignation is accepted the office becomes vacant and the ordinary must appoint some qualified person to discharge the duties of sheriff until the vacancy is filled by election. If the ordinary fails to fill the vacancy, the coroner of the county shall act as sheriff, and if there is no coroner, the sheriff of any adjoining county is authorized to act as sheriff.

[Sections referred to herein will be found in the 1933 Georgia Code.]

This is in response to your letter of March 27, 1974, requesting my opinion as to the proper procedure to be followed by a sheriff when resigning and the procedure to be followed in filling the vacancy caused by such a resignation.

The only provisions for reporting resignations of public officers is found in Ga. Code § 89-504, which states that:

> "The resignations of Senators and Representatives in Congress, members of the General Assembly, and of all officers whose commissions issue from the office of Secretary of State or the Executive Department, and whose places may be supplied by executive appointment, shall be made to the Governor."

While this provision is subject to interpretation, the sheriff is an officer commissioned by the Executive Department pursuant to Ga. Code § 89-202, and therefore should submit his resignation to the Governor.

Georgia Code § 89-501 (2) provides that the resignation shall become effective and the office shall be vacated when the resignation is accepted.

Once the office is vacated, Ga. Code § 24-2803 provides that the vacant office be filled as are vacancies in the offices of clerks of the

superior courts. Georgia Code § 24-2707, made applicable to sheriffs by the provisions cited above, provides that the office of clerk shall be filled as soon as a vacancy occurs by an appointment of a qualified person by the ordinary.

Georgia Code § 24-2704, also made applicable to the office of sheriff by the above-cited Code section, provides that when a vacancy occurs in the office of clerk of a superior court, the ordinary of the county shall call a special election by giving notice "... in one or more of the public newspapers of said county ... and at the courthouse, and at three or more of the most public places of said county, 20 days previous to the day of election, which shall be appointed by him."

However, it should be noted that Ga. Code § 24-2709, made applicable to the office of sheriff pursuant to the above-cited Code section, provides that if an election cannot be held more than six months from the time the existing term expires, the person appointed by the ordinary pursuant to Ga. Code § 24-2707 shall serve the balance of the unexpired term.

In the event that the ordinary fails to appoint a person to fill the office of sheriff, Ga. Code § 24-2803 provides that the coroner of the county shall act as sheriff, and if there is no coroner the ordinary shall make a temporary appointment, and, on the failure of both, the sheriff of any adjoining county is authorized to act as sheriff until the ordinary shall make the appointment or until there is an election.

Common Cause GEORGIA

403 W. Ponce de Leon Ave., Suite 107, Decatur, GA 30030 • (404) 373-8897

FOR IMMEDIATE RELEASE
December 4, 1980

REFERENCE:
Kathleen Kessler
457 8354

PUBLIC AWAITS SPECIAL ELECTION

Common Cause/Georgia requested the Secretary of State to announce the date of the special election for the State Supreme Court position to be open when Justice Jesse Bowles finishes his term December 31, 1980.

"We are so pleased that the public will get a chance to elect two Supreme Court Justices in a row to their initial terms," stated Kathleen Kessler, Chair, CommonCause/Georgia. "This new tradition puts back into practice the constitutional requirement of public election of all judges.

"Many citizens may not realize that not a single State Supreme Court justice nor State Court of Appeals judge now serving was initially selected in an open election. Every one was initially appointed to 'fill out' the unexpired term of another judge.

"We applaud Justice Bowles for making it clear to the Public that he does not intend to serve in his new term - so that there will be a new election held - rather than yet another appointment by just one citizen."

GEORGIA SUPREME COURT

Busbee appointees: Jesse G. Bowles. Thomas O. Marshall, Jr. Harold G. Clarke

Sanders appointees: H.E. Nichols Hiram Undercofler

Carter appointees: Robert H. Jordan Harold N. Hill, Jr.

GEORGIA COURT OF APPEALS

Busbee appointees: William L. McMurray, Jr. George T. Smith Arnold Shulman Harold R. Banke A.H. Birdsong, Jr. George H. Carley John W. Sognier

Sanders appointees: Braswell D. Deen, Jr. J. Kelley Quillian

Exhibit "X"

Respondent's Brief

2

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No. 81-1055

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DAVID B. POYTHRESS, As Secretary of State, State of Georgia, GEORGE D. BUSBEE, Individually and as Governor of the State of Georgia, JESSE G. BOWLES, and HARDY GREGORY, JR., as Associate Justice, Supreme Court of Georgia,

Petitioners,

v.

ELIZABETH B. DUNCAN, ELIZABETH N. STOUT, and KATHLEEN KESSLER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, UNIT B, NOW THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT KATHLEEN KESSLER

KATHLEEN KESSLER, Respondent, *pro se*
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QUESTION PRESENTED

Whether the usurpation by the Governor and Supreme Court Justice of Georgia of Respondents' right to elect a Georgia Supreme Court Justice violates Respondents' fundamental Constitutional rights.

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No. 81-1055

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DAVID B. POYTHRESS, As Secretary of State, State of Georgia, GEORGE D. BUSBEE, Individually and as Governor of the State of Georgia, JESSE G. BOWLES, and HARDY GREGORY, JR., as Associate Justice, Supreme Court of Georgia,

Petitioners,

v.

ELIZABETH B. DUNCAN, ELIZABETH N. STOUT, and KATHLEEN KESSLER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, UNIT B, NOW THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT KATHLEEN KESSLER

STATEMENT OF THE CASE

Respondents sued Georgia's Governor and Supreme Court Justice, charging they had deprived them and all Georgians of their constitutional right to elect a new Justice. The device alleged was this:

Justice Bowles ran for reelection November 4, 1980, was elected, resigned November 20, 1980, and with intent not to serve, took the oath for the same office, resigned

again after three hours in office so that Governor Busbee could (and he did) appoint Bowles' successor, one Gregory. Such scheme fraudulently took away voters' franchise rights to pick a Georgia Supreme Court Justice.

Trial Judge Freeman's statement of facts was so clear and succinct that the Fifth/Eleventh Circuit adopted it into its affirming decision, and so does this Respondent Kessler, in the name of brevity, making it a part of this paragraph by reference to it. *Duncan, et al. v. Poythress, et al.*, 515 F.Supp. 327, 331-335 (N.D.Ga. 1981), 657 F.2d 691, 708-712 (5th Cir. 1981). [C.A. 51a-61a].

ARGUMENT

The events as described in the statement of facts have no parallel in fact or law in this country's history.

No single authority settles the legal problems raised by this case. There is no casuistic way to go on this new ground.

No case cited by Petitioners is pertinent in an authoritative sense to Petitioners' argument, nor is Petitioners' argument relevant to the facts AS FOUND BY THE DISTRICT COURT.

The authority establishing Respondents' franchise is the law and Constitution of Georgia which command a special election of the Supreme Court Justice under these facts. Constitution of Georgia of 1976, Article VI, Section II, Paragraph III; Georgia Code §34-1514.

The cites and authorities in the lower courts' opinions on Respondents' substantive due process right are pertinent and pointed. To have all Georgians' vote "purposely abrogated" is a matter of fundamental, governmental unfairness. *Duncan, supra*, 657 F.2d at p. 704.

What compels the outcome of this case as the courts have already found is its right and righteousness. The Governor and Supreme Court Justice of the State of Georgia ought not to be allowed to conspire together to deprive the citizenry of the election of its Supreme Court Justice.

I respectfully go my own way from the circumlocutive path taken by my fellow attorneys, on both sides.

CONCLUSION

The best and only authority for the facts of this case is found in the two well written and well reasoned opinions of the circuit court and district court, which opinions I respectfully ask this Honorable Court to affirm.

Respectfully submitted,

Kathleen Kessler

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